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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

RALPH RODNEY FIELDS,

Petitioner,

v.

JOSEPH T. DURHAM, ET AL.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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14-10-1914

QUESTIONS PRESENTED

A. Whether the Court of Appeals erred when it violated 28 U.S.C. §1738 by failing to give preclusive effect to a prior state court judgment.

B. Whether the Court of Appeals erred in failing to stay the federal court appeal, in light of the judgment entered in the state trial court and the pending state court appeal.

C. Even assuming, that the Fourth Circuit was permitted to consider issues previously decided by the State Court Judgment, did the Fourth Circuit err in exceeding its authority and mandate from this Court, in departing from the proper standard of review and in making findings of fact which were not decided nor before the District Court and which were factually in dispute in the record below.

PARTIES TO THE PROCEEDING

Ralph R. Fields ("Fields") was Plaintiff in the trial court and is Petitioner herein. Joseph T. Durham, James S. Jeffers, and the Board of Trustees of Community College of Baltimore were Defendants in the trial court and are Respondents herein.

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**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1990

No.

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JOSEPH T. DURHAM, et al,

Respondents

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

I.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit on remand is reported at 909 F.2d 94 (4th Cir. 1990).

The decision of the United States Supreme Court which granted certiorari and remanded the case back to the Fourth Circuit is reported at 110 S.Ct 1313 (1990). The first opinion of the Fourth Circuit is reported at 856 F.2d 655 (4th Cir. 1988). The opinion of the District Court is set forth at Appendix A (hereinafter "Apx. A"). The Fourth Circuit's Order denying Petitioners Motion To Stay Federal Appeal Process During Pendency of State Court Appeal is set forth at Apx. F. The Fourth Circuits Order denying Petitioner's Petition for Rehearing with Suggestion for Rehearing in Banc is set forth at Apx. H.

II.

JURISDICTION

The Court of Appeals for the Fourth Circuit's denial of Petitioner's Petition for Rehearing with Suggestion for Rehearing In Banc was entered on August 14, 1990. Apx. H. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

III.

STATUTORY PROVISIONS INVOLVED

A.

42 U.S.C. 1983 provides in part:

Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at

law, suit in equity, or other
proper proceeding for
rendered....

B.

28 U.S.C. §1738 provides in part:

....

Such acts, records and
judicial proceedings or copies
thereof, so authenticated,
shall have the same full faith
and credit in every court
within the United States and
its Territories and Possessions
as they have by law or usage in
the court of such State,
Territory, or Possession from
which they are taken. June 25,
1948, c. 646, 62 Stat. 947.

IV.

STATEMENT OF CASE

Petitioner Fields originally filed a Complaint in the United States District Court for Maryland alleging that the process followed by Respondents in depriving him of his tenure and employment at Respondent college was insufficient and violated both his contractual and constitutional rights. He alleged that Respondents failed to comply with the bylaws and failed to give him proper notice and hearing. These specific allegations are set forth in the Apx. G.

Thereafter, this case was dismissed by the United States District Court for the District of Maryland on January 29, 1988. Without looking beyond the face of the Complaint, the District Court

reasoned that, under Parratt v. Taylor, 451 U.S. 527 (1981), the availability of postdeprivation remedies in the state court barred Petitioner's claim under 42 U.S.C. §1983. Apx.A. The District Court ruled that "Petitioner has stated no claim under §1983", however "[h]e is free to pursue [his state law] claims in state court." Apx. 3a.

The Fourth Circuit affirmed the District Court's dismissal of the case under Parratt v. Taylor, noting that Petitioner had meaningful postdeprivation "remedies which he may pursue in state court." Fields v. Durham, 856 F.2d 655, 657 (4th Cir. 1988) (hereinafter Fields I).

Following Fields I, Petitioner Fields sought a Writ of Certiorari to the Fourth Circuit. In addition, following

the instructions of the District and Circuit Court, Fields also initiated an action against the Respondents in the state court case entitled Fields v. Durham, et al, Circuit Court for Baltimore City, Case No. 89-116-064/CL96499, seeking to litigate his available state remedies.

In the state court proceeding, additional discovery was undertaken, and presented to the Circuit Court for Baltimore City by way of motions for summary judgment. After extensive briefing and review of summary judgment papers, including, the newly produced deposition of Dr. Cortada, the state court granted summary judgment in Petitioner Fields' favor and held as a matter of law that Dr. Fields had tenure as a faculty member and that the actions

of the Respondents violated both his contractual and constitutional rights under Maryland State law. Following this ruling, the case proceeded to trial before a jury and after approximately one week of listening to extensive evidence from sixteen (16) witnesses, the jury rendered a verdict in Plaintiff's favor and awarded him substantial compensatory and punitive damages.

On March 1, 1990, the Circuit Court for Baltimore City denied Respondent's Motion For Judgment N.O.V. Or, In The Alternative, Motion For New Trial. Apx. D. Thereafter, a judgment was enrolled against the Respondents and in favor of the Petitioner.

On March 5, 1990, this Court granted certiorari, vacated Fields I, and remanded the case to the Fourth Circuit

for reconsideration in light of Zinnermon v. Burch. Fields v. Durham, ____ U.S. ____, 110 S.Ct. 1313 (1990). Thereafter, the Fourth Circuit by order dated March 26, 1990, instructed Petitioner and Respondent's to file supplemental briefs.

By this time, however, the case had already been tried in state court, and Fields had a judgment in his favor. Therefore, on April 13, 1990, he filed a Motion To Stay Federal Appeal Process During Pendency Of State Court Appeal ("Motion To Stay"). Apx. E. In his Motion To Stay, Petitioner presented the Fourth Circuit with the fact that he had already obtained a judgment against Respondents in the Circuit Court for Baltimore City, which judgment was presently being appealed by said Respondents to the Maryland Court of

Special Appeals. Apx. 4e-4g. Fields requested that the Fourth Circuit stay the federal appeal, asserting that, in light of the state court judgment, the state court proceeding would have a "collateral estoppel" effect on any further proceedings in the federal court. Apx. 7e.

Simultaneously with his Motion To Stay, Fields also filed a Supplemental Brief as instructed by the Fourth Circuit. Apx. F. In the Supplemental Brief Fields incorporated the Motion To Stay and argued that the "operant facts" relevant to the federal appeal had already been determined in the state court.

Subsequently, the Fourth Circuit denied Petitioners Motion to Stay (Apx. F) and rendered an additional opinion.

Fields v. Durham, 909 F.2d 94 (4th Cir. 1990) (hereinafter "Fields II"). In Fields II, although the Fourth Circuit found that Parratt did not bar a cause of action under Section 1983, it ignored the state court judgment, went beyond the face of the Complaint, and in rendering an opinion, made determinations on factual issues which were never considered below by the United States District Court and which directly contradict the factual and legal findings made by the state court.

Apparently, the Fourth Circuit in Fields II overlooked the state court judgment. Although the Court recognized that "Fields is now in state court seeking compensatory and punitive damages", Fields II, 909 F.2d at 98-99, it failed to acknowledge the fact that

Fields had already proceeded to trial and obtained a judgment in the state court.

It is from the Fourth Circuit's decision in Fields II as well as the Fourth Circuit's denial of Petitioner's Motion To Stay that this Petition For Certiorari is filed.

V.

REASONS FOR GRANTING THE PETITION

A.

The Fourth Circuit Violated 28 U.S.C. §1738 By Failing To Give Preclusive Effect To A Prior State-Court Judgment

1. Introduction

It is a well settled principle of law that pursuant to the full faith and credit statute, 28 U.S.C. §1738, a federal court must give a state court judgment the same preclusive effect, by way of res judicata and collateral estoppel, as would be given that judgment

under the law of the state in which the judgment was rendered. Allen v. McCurry, 449 U.S. 90, 96-97 (1980) (hereinafter "Allen"); Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482 (1982) (hereinafter "Kremer"); Migra v. Warren City School District, 465 U.S. 75, 81 (1984) (hereinafter "Migra"); Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 381 (1985) (hereinafter "Marrese"); Parsons Steel, Inc. v. First Alabama Bank, 474 U.S. 518, 522-523 (1986) (hereinafter "Parsons").

In fact, by specifically requiring all federal courts to give preclusive effect to state court judgments, Congress has chosen to deprive federal courts of subject matter jurisdiction to determine any factual or legal issue whenever a prior state court judgment would be given

res judicata or collateral estoppel effect in the state from which the judgment emerged. See, Allen, 449 U.S. 90, 96, 102 (1980); Thistlethwaite v. New York, 362 F.Supp. 88, 92 (S.D.N.Y. 1973); Mack v. Municipality of Penn Hills, 547 F.Supp. 863, 868 (W.D.Pa. 1982).

In the instant case, after this Court had vacated and remanded Fields I, Petitioner Fields presented the Fourth Circuit with a state court judgment in his favor. Apx. E. Despite Petitioner's objections, the Fourth Circuit ignored the state court judgment and, in Fields II, rendered an opinion which completely contradicts the legal and factual findings upon which the state court judgment was based.

The Fourth Circuit's actions are in direct violation of 28 U.S.C. §1738,

because under Maryland law, the state court judgment would have precluded the Respondents from relitigating the issues underlying that judgment in a second state court action. Therefore, the full faith and credit statute, 28 U.S.C. §1738, precluded further adjudication of those issues by the federal court.

By failing to consider or apply the preclusive effect of the state court judgment, the Fourth Circuit failed to "apply the approach to §1738 that [this Court has] outlined" on numerous occasions. See e.g., Marrese, 470 U.S. at 381-387; Parsons, 474 U.S. at 522. Therefore, Fields II should be reversed and the case remanded with instructions to return the case to the District Court to interpret the Maryland preclusion law

and apply it pursuant to 28 U.S.C. §1738.¹

2. The State Court Judgment

At the conclusion of a hearing on January 2, 1990 before the Circuit Court of Maryland for Baltimore City, Judge Hillary D. Caplan made the following findings of fact and rulings of law:

The Court finds there is tenure in this case and that under the June 3, 1970 letter, tenure was granted in two particular areas. One, as a faculty member, ... and also administrator

¹In both Marrese and Parsons, this Court found that the Court of Appeals erred in failing to consider the preclusive effect of a state court judgment under state law. Marrese, 470 U.S. at 387; Parsons, 474 U.S. at 522. In both cases this Court reversed the Court of Appeals and remanded with instructions to return the case to the District Court for a determination of the preclusive effect of the state court judgment under state law. Marrese, 470 U.S. 387; Parsons, 474 U.S. at 522.

So, the Court finds that it will grant a Motion For Summary Judgment, number one finding there is indeed tenure as a faculty member. Number two, [respondents] violated [Fields] contractual and constitutional rights ...since he was not granted [notice and hearing] under the original bylaws

Apx. 3b. Following this hearing, an Order was filed with the Circuit Court of Baltimore City stating that:

Partial summary judgment shall be entered in favor of Plaintiff on the issues of violation of his due process rights and breach of his contractual rights in connection with his status as a tenured faculty member.

Apx. C.

Following the state court jury verdict in Petitioner's favor and the denial of Respondent's Motion For Judgment N.O.V., Apx. D, this order of partial summary judgment became a final judgment. See, Maryland Rule of

Procedure 2-601; Walbert v. Walbert, 310 Md. 657 (1987).

3. Collateral Estoppel Under Maryland Law.

Under Maryland law, the doctrine of collateral estoppel (or issue preclusion) would bar Respondents from relitigating the issue of tenure and all Petitioner's rights and interests derived therefrom in a second state court proceeding. The doctrine of collateral estoppel holds that "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim." Murray International v. Graham, 315 Md. 543, 547 (1989) (quoting

Restatement (Second) of Judgments §27 (1982)). In sum, there are four essential elements necessary to invoke the principle of collateral estoppel: (i) identity of parties; as well as an issue of fact or law which is (ii) actually litigated; (iii) determined by a valid and final judgment; and (iv) essential to the prior judgment. See, e.g., Murray International v. Graham, 315 Md. 543, 549-50 (1989).

These elements are each satisfied in the present case. First there is an identity of parties. The Respondents herein were also the defendants in the state court proceeding in which a judgment was entered against them.

Second, the prerequisite of a prior issue of fact or law actually having been litigated is also satisfied in this case.

"'When an issue is properly raised, by the pleadings or otherwise, and is actually submitted for determination, and is determined, the issue is actually litigated'" Murray International v. Graham at 549-50 (1989) (quoting Restatement (Second) of Judgments §27, comment d (1982)). Where, as in the present case, a party moves for summary judgment as to a particular issue and a court enters summary judgment in that party's favor, the matter is deemed "actually litigated". Restatement (Second) of Judgments §27, Comment d and illustration 10 (1982).

Third, the judgment of the Circuit Court for Baltimore City is a valid and final judgment for purposes of collateral estoppel. "When an action for damages precedes to trial and a judgment is

entered on the verdict, that judgment represents a final determination of Plaintiff's claim" Welsh v. Gerber Products, 315 Md. 510, 523 (1989). In the present case, the court's partial summary judgment in Petitioner's favor was followed by a jury trial and a jury verdict in Petitioner's favor which became a final judgment under Maryland Rule 2-601. "Once final, the judgment is properly given preclusive effect as to the issues actually litigated." Welsh v. Gerber Products, 315 Md. 510, 523 (1989).

Finally, the issue of fact or law must be essential to the prior judgment. In the present case, the Circuit Court for Baltimore City ruled that Petitioner's position as a tenured faculty member was terminated without any notice or hearing in violation of his

contractual and constitutional rights. Apx. B and C. This ruling is of necessity premised upon the express finding of fact that Petitioner Fields held a tenured status as a faculty member, a property interest which the Court defined and recognized under Maryland state law. Apx.36-46.

Since the issue of tenure and its inherent rights and interests was actually litigated and determined by a final judgment of the Circuit Court for Baltimore City, Respondents would have been barred from relitigating these issues in a second action in the Maryland Courts. Therefore, the full faith and credit statute, 28 U.S.C. §1738, also precluded further litigation of that issue by the federal courts.

In Fields II, however, the Fourth Circuit did not give preclusive effect to the judgment of the Circuit Court for Baltimore City. Instead it rendered a conflicting, inconsistent opinion wherein it re-examined the tenure issue, rejecting Fields' argument that he held a property interest in his continued employment as a tenured faculty member which could not be terminated without notice or hearing. Fields II, 909 F.2d at 98.

The Fourth Circuit pointed out that "the rules of the college, as embodied in the 'Conditions Of Appointment For Administrative And Non-Instructional Personnel'" (hereinafter "Conditions of Appointment") did not appear to permit Fields to be a member of the tenured faculty as well as an administrator. Id.

Under 28 U.S.C. §1738 the Fourth Circuit should never have even addressed the effect of the conditions of Appointment and their effect on Fields tenured status. This issue was fully litigated in the State court. The statement regarding the Conditions of Appointment directly contradicts the express language of the Circuit Court for Baltimore City which stated that, in addition to his administrative position, Fields held a tenured faculty position which was terminated without any notice or hearing. Apx. B and C.²

² This finding of fact by the Circuit Court for Baltimore City was based, in part, upon the deposition of President Rafael Cortada who was the author of the Conditions Of Appointment For Administrative And Non-Instructional Personnel. In his deposition, former President Cortada stated specifically that Fields held both a tenured faculty and administrative employment with the respondent college.

The Fourth Circuit, in Fields II, went on to state that it had "been reluctant to recognize multiple property interests within the same employment relationship." Id. at 98. Again, this attempt to relitigate Fields' tenured status as a faculty member of the Respondent college constitutes a failure to give preclusive effect to a prior state judgment and is strictly prohibited by 28 U.S.C. §1738. The Fourth Circuit simply had no subject matter jurisdiction to consider the issue of tenure.

"Property interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law....'" Cleveland Board of Education v. Loudermill, 470 U.S. 523, 538 (1985)

(citing Board of Regents v. Roth, 408 U.S. at 577). The dimensions of Fields' property interests in continued employment as a faculty member stem from state law. See, Board of Regents v. Roth, 409 U.S. at 577; Cleveland Board of Education v. Loudermill, 470 U.S. at 538.

In this case, the Circuit Court for Baltimore City considered state law when it interpreted and applied the Conditions of Appointment and the Respondent college's bylaws as well as Petitioner Fields' contractual rights. In fact, the Circuit Court for Baltimore City had already defined the dimensions of Fields' property interest under state law, to wit: Fields held tenured status as a faculty member at the Respondent college for which he was to be afforded a hearing

and notice prior to termination. Apx. B and C.

Although the Fourth Circuit may have been "reluctant to recognize a property interest" in this context, it was bound to give the State Court findings of fact the same preclusive effect which would have been given in a second State Court proceeding. Therefore, 28 U.S.C. §1738 precluded the Fourth Circuit from analyzing the tenure issue. Allen v. McCurry, 449 U.S. 90 (1980) (state court judgment entitled to collateral estoppel effect in subsequent federal action brought under 42 U.S.C. §1983); University of Tenn. v. Elliott, 478 U.S. 788 (1986) (federal courts must give state agency factual findings same preclusive effect which they would be given in state court). Calvert Fire Ins.

Co. v. American Mutual Reinsurance Co., 600 F.2d 1228, 1236 n.18 and accompanying text (7th Cir. 1979) (state court findings of fact are entitled to collateral estoppel effect in a parallel federal proceeding, even if dispositive of a federal question) (citing, Becher v. Contoure Laboratories, Inc., 49 S.Ct. 356 (1929)); Brannan v. Eisenstein, 804 F.2d 1041, 1045 (8th Cir. 1986).

In addition, the Fourth Circuit also erred in its reliance on Huang v. Board of Governors, 902 F.2d 1134 (4th Cir. 1990) (hereinafter "Huang") and Royster v. Board of Trustees, 774 F.2d 618 (4th Cir.) (hereinafter "Royster") cert denied, 475 U.S. 1121 (1985). The court relied on these cases for the proposition that Fields could not hold two property interests, one as an administrator and

one as a tenured professor. Fields II
909 F.2d at 98.

The Royster and Huang cases, are so factually distinguishable from the Fields case that reliance upon them is entirely erroneous.³ More importantly, however,

³ The Royster case involved a superintendent who was employed under a renewable contract. Prior to the expiration date of the contract, Royster's employer terminated him but paid him monthly checks which he accepted as compensation for the remaining contract period. Not satisfied with this compensation, however, Royster filed suit under Section 1983 claiming that, in addition to his contractual right to salary, he also had a protected property interest "to actively engage in and execute the duties of his office" for the remainder of the contract term. Royster, 774 F.2d 618, 621 (4th Cir. 1985).

The Fourth Circuit held that "Royster's contract afforded him only the right to be fully compensated, and not the right occupy the office of superintendent." Id. at 621. Moreover, the Court emphasized that Royster had directed it to no authority to support his property interest in physically possessing his job. Id.

The present case is distinguishable from Royster in that Fields is not attempting to assert a novel property interest in occupying his position as a tenured faculty member, but rather, Fields was asserting his interest in receiving a notice and hearing prior to termination of that interest. Moreover, unlike Royster, in the instant case, Fields did direct the court to authority to support his position. As noted above, the Circuit Court for Baltimore City had already ruled as a matter of law that Fields' tenured position required that he receive notice and hearing prior to termination. Apx. B. When an employee has a property interest in continued employment, it cannot be deprived without any prior notice or hearing. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985).

Likewise, the Huang case is also distinguishable. In Huang, a tenured college professor was involuntarily transferred from one division to another division within a state university. However, the professor remained a tenured professor at the same or higher salary. The professor also received a full hearing in which his opposition to the transfer was heard over a nine day period involving approximately 40 hours of testimony from 18 witnesses. Huang, 902 F.2d at 1137-39. The professor argued that he had a property right in his original position and should not have been transferred. Id. at 1142.

under 28 U.S.C. §1738, the Court should not have been considering this issue and in doing so it failed to recognize Fields' property interests as defined by state law in a prior state court judgment, which included notice and hearing prior to termination of his tenured position as a faculty member of the Respondent college. This decision by the state court barred any relitigation

The Fourth Circuit ruled that "transfer of a tenured professor from one department to another, without loss of rank or pay, does not implicate any property interest protected by the due process clause." Id. In reaching this decision, the court relied upon Royster.

The Huang case is vastly different from the facts in the present case. Unlike the Huang case, Fields is not asserting some novel right to physically possess a job in light of a transfer with pay, but rather, is asserting the traditional and long standing right of a tenured professor to notice and hearing prior to complete and sudden termination of his state defined property interest.

of the issue in a subsequent state court action and therefore, under 28 U.S.C. §1738 the Fourth Circuit lacked subject matter jurisdiction to consider the issue of tenure.

4. Conclusion

Under 28 U.S.C. §1738, and its predecessor statutes, the federal courts, for over 200 years, have consistently applied res judicata and collateral estoppel to causes of action and issues decided by state courts. Kremer v. Chemical Construction Corp., 456 U.S. 461, 465-468, n.6 (1982). "When a state court has adjudicated [an] issue, [the doctrine of collateral estoppel] serve[s] to 'promote harmony between state and federal courts that has been a bulkward of the federal system.'" Id. Under Maryland law the judgement of the Circuit

Court for Baltimore City would have precluded Respondents from relitigating the issue of tenure in a second suit in the Maryland Courts. Therefore, the full faith and credit statute, 28 U.S.C. §1738 precluded further consideration of that issue by the Fourth Circuit.

The Fourth Circuit's decision in Fields II, directly conflicts with this Courts numerous precedents and does violence to the rationale underlying 28 U.S.C. §1738 and therefore, it must be reversed and the case remanded with instructions to return the case to the District Court to interpret Maryland issue preclusion law and apply it relative to 28 U.S.C. §1738.

B.

**The Fourth Circuit Erred When
It Failed To Stay The Federal Court
Appeal Proceeding In Light Of A
State Court Judgment And Pending**

**State Court Appeal In The Parallel
State Court Litigation**

Throughout this litigation the federal courts have told Fields to pursue his remedies in the state court.⁴ In fact, in Fields I, the court stated that the dismissal of Fields' \$1983 claim under Parratt was justified only because of the fact that he had these remedies which he could pursue in state court. Fields I, 856 F.2d at 659. See also, Fields II, 909 F.2d at 98-99. Fields did

⁴ The United States District Court for the District of Maryland told Fields that he was "free to pursue [his state law] claims in the state court." Apx. _____. In Fields I, the Fourth Circuit told Fields that he had meaningful post deprivation "remedies which he may pursue in state court." Fields I, 856 F.2d at 657. In Fields II, the Fourth Circuit instructed Fields that the proper form to explore his contract violations and deprivation of property interest under the Maryland Constitution was in state court. Fields II, 909 F.2d at 98-99.

go to the state court and obtained a judgment in his favor.

After obtaining his judgment Fields filed his Motion To Stay The Federal Appeal Process. Apx. E. The Fourth Circuit, however, denied Fields' Motion To Stay, Apx. F, and in its subsequent opinion, Fields II, failed to even recognize that Fields had obtained a judgment in the State Court. Rather, the court appeared to assume that Fields was still in the pre-trial stages of litigation.⁵

Generally, federal courts have discretion to stay an action when there

⁵ In Fields II the Fourth Circuit noted that Fields "is now in state court seeking compensatory and punitive damages for numerous contract violations and deprivation of his property interest under the Maryland Constitution." 909 F.2d at 98-99. However, at that time, Fields had already, in fact, obtained a judgment against the Respondents. Apx. D.

is an ongoing parallel action in the state court. Colorado River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236 (1976) (hereinafter "Colorado River"); LaDuke v. Burlington Northern Railroad Company, 879 F.2d 1556, 1558 (7th Cir. 1989) (hereinafter "LaDuke"). The court's discretion is not unreviewable, Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 19, 103 S.Ct. 927, 938 (1983), and rests "on considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" Colorado River, 424 U.S. at 817, 96 S.Ct. at 1246. However, "the mere fact that an action is pending in state court ordinarily is no bar to parallel federal proceedings." LaDuke,

879 F.2d at 1558. Rather, the surrender of jurisdiction in deference to parallel state proceedings is warranted only in special circumstances. Id.

In the present case, such special circumstances exist. When Fields filed his Motion to Stay, the parallel state proceeding was no longer "pending" or "ongoing", rather, the proceedings in the state court had already reached a conclusion and a judgment had been entered in Fields' favor. Menzel v. County Utilities Corp., 501 F. Supp. 354, 359 (E.D. Va. 1979) (staying federal proceeding where state court judgment had been entered in parallel state court proceeding, pending state court appeal). The Fourth Circuit overlooked this fact and proceeded to address the factual merits of Fields' case which had already

been determined by the state court judgment. The results of this repetitive "litigation of identical issues" already determined by the state court is both "unseemly" and a "grand waste" of the efforts of the parties and the courts. See, LaDuke, 879 F.2d at 1560. "But judicial economy is not the only value that is placed in jeopardy. The legitimacy of the court system in the eyes of the public in fairness to the individual litigants are also endangered by duplicitous suits...." Lowman Construction, Inc. v. Brant Construction Co., 780 F.2d 691, 694 (7th Cir. 1985).

In the present case, numerous factors compelled the federal court to stay the federal appeal process. First, the federal court had specifically instructed Fields to seek remedies in

state court.⁶ Therefore, it was inappropriate to ignore the State Court's determination of facts once Fields had received a judgment in the Circuit Court for Baltimore City.

The Fourth Circuit ruled that its dismissal of Fields' \$1983 action was justified only on grounds that he had adequate state court remedies. Fields I, 856 F.2d at 659; Fields II, 909, F.2d at 98-99. If the state appellate court reversed the state trial court judgment, then there may, in fact, be no adequate remedies for Fields in state court. Therefore, the Fourth Circuit should have stayed the appeal proceedings pending the outcome of the state court appeal so that it could reconsider the dismissal of his

⁶ See footnote 4 and accompanying text, supra at ____.

§1983 action should Fields have no adequate state court remedies. Moreover, by staying the action and permitting the state court judgment to proceed on appeal in the state court, the federal court could have possibly avoided the constitutional issue in Fields II, See, e.g., Glasgow, Inc. v. Noetzel, 556 F.Supp. 595, 599 (S.D.W. Va. 1983); Calvert Fire Insurance Co. v. American Mutual Reinsurance Co., 600 F.2d 1228, 1236 (7th Cir. 1979).

The "desirability of avoiding piecemeal litigation" and the duplicating of efforts and the possibility of reaching different and inconsistent results further weighed in favor of staying the proceedings. See, e.g., LaDuke, 879 F.2d at 1560; Day Union Mines, Inc., 862 F.2d 652, 659 (7th Cir. 1988).

Furthermore, under the Feldman Doctrine announced in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303 (1983), a lower federal court cannot effectively take appellate jurisdiction of state court decisions. Lewis v. East Feliciana Parish School Board, 820 F.2d 143, 146 (5th Cir. 1987). By overlooking the state court judgment, and making factual determinations contrary to those made by the Circuit Court for Baltimore city, the Fourth Circuit was "in essence" reviewing the state court judgment which it had no appellate jurisdiction to do. See, Id., at 146.

As a matter of comity, federal courts should avoid the risk of misinterpreting state law. Here, by failing to grant Fields' Motion To Stay

the federal court did improperly interpret state law relative to Fields' rights under his contract with Respondent, the Respondents' bylaws and the Conditions of Appointment.

Under the facts of this litigation, the fourth Circuit abused its discretion when it failed to grant Fields Motion to Stay. Therefore, this Court should reverse the Fourth Circuit's Opinion in Fields II, and remand the case to the Fourth Circuit with instructions to stay the federal appeal pending the outcome of the state court appeal of the state court judgment. See, LaDuke, 879 F.2d 1556 (1989); (district court properly stayed federal litigation pending resolution of parallel state claims which threatened inconsistent results); Royster v. Chrysler Corp., 864 F.2d 1299 (7th Cir.

1988) (stay rather than dismissal, is appropriate procedural mechanism for the district court to employ in deferring to parallel state court proceeding); Menzel v. County Utilities Corp., 501 F. Supp. 354, 359 (E.D. Va. 1979) (district court stayed federal action until appeal from state court judgment had run its course).

C.

Even assuming, that the Fourth Circuit was permitted to consider issues previously decided by in the State Court Judgment, the Fourth Circuit erred in exceeding its authority and mandate from this Court, in departing from the proper standard of review and in making findings of fact which were not decided nor before the District Court and which were factually in dispute in the record below.

1. Introduction

Originally, in Fields I the Fourth Circuit affirmed the District Court's dismissal on ground that, under the Parratt line of cases, the availability of postdeprivation remedies in State

Court was sufficient to satisfy the requirements of due process. Fields I, 856 F.2d at 657. Fields sought a Writ Of Certiorari, arguing that the Fourth Circuit's application of Parratt conflicted with the decision of a majority of the other Circuits. This Court granted certiorari and the case was subsequently vacated and remanded for the Circuit Court to reconsider its application of Parratt in light of Zinnermon v. Burch, 100 S.Ct. 975 (1990).

On remand, however, the Fourth Circuit affirmed its prior opinion, but "for different reasons." Fields II, 909 F.2d at 96. Surprisingly, the Court went beyond its authority and mandate in making findings of material facts which were in dispute below. See, Id. at 96-89. Accordingly, the Fourth Circuit departed

from the proper standard of review and made factual findings that were contrary to the evidence before the District Court. See Apx. G.

The Fourth Circuit's affirmance is based on entirely new factual findings which were not considered by the District Court when it dismissed Petitioners case for failure to state a §1983 claim under Parratt. The dismissal was based on Petitioner availability of state postdeprivation remedies and not factual considerations. Apx. 3a-4a. Notwithstanding, the Fourth Circuit's new factual findings contradict the factual allegations of the Amended Complaint as well as the undisputed Affidavits, discovery pleadings and documentary evidence before the District Court. Apx. G.

Furthermore, these factual findings were contrary to the evidence established at subsequent hearings and a one week trial in the state court, which the Fourth Circuit completely, as argued above, overlooked and ignored. Finally, by making determinations on factual issues, the Court failed to properly apply the applicable standard of review. See Apx. 22g-36g.

Though neither Fields I nor Fields II affects or precludes Petitioner from obtaining judgment in the state court on all his state court remedies, (909 F.2d at 98-99) Petitioner contends this Petition should be granted in that the opinion in Fields II is an extreme departure from the accepted and usual course of judicial proceedings. In so doing the Fourth Circuit overlooked

numerous material facts concerning Fields' status as a tenured professor at the time of his termination. These factual matters include the undisputed and uncontroverted affidavits of college officials, deposition testimony and Answers To Interrogatories of Respondents' See Apx. G.; as well as material facts developed in a subsequent jury trial of Fields' claims in the state court, (Fields v. Durham, Circuit Court for Baltimore City, Case No. 89116-064/CL96499), which completely controvert many facts set forth in Fields II.

One such fact alleged in the District Court and more fully developed at the subsequent trial was that it became disputed whether the Board Of Trustees ever held an actual vote to terminate Fields from the college

following the purported Board hearing. Apx. 7g. Therefore, the conclusion reached in Fields II that "after the hearing on August 12, 1986, the Board unanimously affirmed Fields' discharge", (909 F.2d at 96) overlooks material facts which were in dispute below and which were inaccurate in light of the facts established at the intervening state court trial. See Apx. 7g.

The Fourth Circuit further overlooked or incorrectly applied facts different from those established in the record below concerning the circumstances surrounding the notice and process given concerning Fields' termination. Apx. G. The Fourth Circuit overlooked the allegations of the Complaint that the deficiencies given for the termination were not "serious" but rather,

superficial, a pretext, and not actual performance deficiencies. See Petition For Rehearing at Apx. 8g.

Further, the Court ignored many other factual allegations below showing material facts indispute, including that Fields did not waive his appeal to the President's Cabinet. Compare, Fields II 909 F.2d 96 with Apx. 9g. Once Fields learned of the true circumstances surrounding the cabinet's appeal, he demanded an appeal to the President's Cabinet but it was denied him. See Petition, Apx. 9g. These facts were not only alleged in the Amended Complaint, but clearly established at the subsequent trial in the State court. Apx. 9g. Additionally, though the opinion states that Fields had the opportunity to present numerous exhibits, the opinion

overlooks the Petitioners' factual allegations that the Board never gave him an "impartial" hearing in that the Board never reviewed or considered his written and documentary evidence. Id. Apx. 9g-10g.

2. Failure to Apply Proper Standard of Review

By making these determinations the Fourth Circuit has clearly gone beyond the mandate and has failed to apply a proper standard of appellate review.

In the Fields II decision, the Court does not indicate whether it is utilizing a Motion to Dismiss 12(b)(6) or a Motion for Summary Judgment Rule 56, standard of review, nor is it clear that any standard of review was applied. However, affirming the lower court was improper

under either standard of review because the Court of Appeals cannot look outside the Complaint on one hand, and make factual findings on matters which were disputed below on the other. The approach taken by the Court in Fields II will lead to inconsistent interpretations of 42 U.S.C. §1983 and is inconsistent with cases from other Circuits concerning the appropriate standards of review.

Fields II unfairly brushes aside Fields' contention that the Complaint, Affidavits and other evidence before the Court below demonstrated that he held tenure which was terminated without proper notice or hearing.

The facts below did not establish that the Conditions Of Appointment prohibit Fields from holding a tenured position as asserted in Fields II, 909

F.2d at 98. Not only did Fields allege in his Amended Complaint that he held tenure at the time he was terminated, and that his tenured position was not effected by the Conditions Of Appointment (See, Apx. 17g), but he also backed up these allegations with the following uncontroverted evidence: the affidavit of Rafael L. Cortada, past President of the Respondent college and author of the "Conditions Of Appointment"; Affidavit of William Hammond, a former tenured professor and Associate Dean of Finance and Plant Management and former acting President of Respondent college; Affidavit of Raymond C. Bowen, former Vice President of the Respondent college. See Petition For Rehearing And Suggestion For Rehearing In Bank at Apx. G at 6g-7g. This portion of the Appendix clearly sets

forth numerous other uncontroverted evidence before the District Court which was ignored.

The Respondent's Motion in the District Court below was a "Motion To Dismiss And/Or In The Alternative, Motion For Summary Judgment." Though Respondents never raised the Parratt issue in their motion, the court, sua sponte, found that on the fact of Petitioner's Complaint, he had failed to state a claim under §1983 because of the availability to him of postdeprivation remedies in State Court. Fields' Complaint. See, Apx. G. The Court below held as a matter of law that "under these circumstances it is clear that Plaintiff has stated no claim under Section 1983". Id. The District Court made no determination as to material facts that were in dispute and did not

rely upon any of the numerous affidavits, deposition excerpts or other summary judgment papers filed by either Petitioner or Respondent. Id.

Fields I noted that the "district court granted defendant's motion for summary judgment on the §1983 claim" but used 12(b)(6) language in concluding that in light of Parratt "Fields had failed to state a claim cognizable under §1983". Subsequently in Fields II the Fourth Circuit again concluded that "Fields has failed to state a claim under §1983."

Accordingly, it is clear from reviewing these cases that the District Court and Fields I dealt strictly with the face of the Complaint in finding Fields failed to state a claim under §1983 upon which relief could be granted.

In reviewing a dismissal for failure to state a claim upon which relief can be granted, the Court Of Appeals must accept all material allegations of the Complaint as true and resolve all factual disputes in favor of Petitioner. Kelson v. City of Springfield, 767 F.2d 651, 653 (9th Cir. 1985); O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985). The Court Of Appeals is required to evaluate the correctness of the dismissal solely on the basis of the allegations in the Complaint; it cannot look outside the pleadings nor can it uphold dismissal unless it appears beyond doubt that Plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Id.; Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02 (1957); Ware v. Associated Milk

Producers, Inc., 614 F.2d 413, 415 (5th Cir. 1980); O'Quinn v. Manuel, 767 F.2d 174, 177 (5th Cir. 1985). Although the Court Of Appeals may affirm a district court's dismissal on any basis fairly supported by the record, dismissal under Federal Rule Of Civil Procedure 12(b)(6) should not be affirmed unless it is clear that the complaint could not be saved by any amendment. Kelson v. City of Springfield, 767 F.2d 651, 656 (9th Cir.1985).

The case of Ware v. Associated Milk Producers, Inc., 614 F.2d 413 (5th Cir. 1980) presented facts similar to the present case. There the defendant had filed a "Motion To Dismiss Or For Summary Judgment" like the Respondents. In Ware a dispute arose over whether the lower court's order granting the motion a grant

of dismissal or summary judgment. Id. at 414. Although the lower court had "indicated" it was granting summary judgment, the Court of Appeals found that the order itself was based on the Complaint alone and was therefore was a grant of defendant's Motion To Dismiss. Id. Based on this determination, the court held that the proper standard of review was to "evaluate the dismissal solely on the basis of the allegations in the complaint." Id.

Fields takes the position that the Order appealed from in this case is analogous to the Order appeared from in Ware v. Associated Milk Producers, Inc., supra. As such, the Circuit Court was required to evaluate the District Court's Order solely on the basis of the Complaint. However, this standard of

review for a Motion To Dismiss was not followed. By concluding that Fields tenured status was "unclear" and apparently not permitted by the Conditions Of Appointment, the Fourth Circuit did not accept the allegations and inferences therefrom in the Complaint as true.

As set forth above, Fields alleged facts which, if accepted as true, demonstrate that he did not receive adequate notice or reasons for his termination, and did not receive a proper hearing, with respect to his tenured position. In light of these facts, it could not have been concluded to a certainty that Fields was entitled to no relief under any statement of facts which could be proved in support of his claim.

See, 2A Moore's Federal Practice, §12.8 at 2271-74 (2d. Ed. 1983).

Assuming for argument's sake, that the appropriate standard of review here was a Rule 56 review, the Fourth Circuit still went beyond its authority in that there were many material facts in dispute as set forth above. Whether Fields received notice as to the termination of his administrative position and/or tenured position with the Respondent college, and whether he received a fair and impartial hearing with respect to his administrative and/or tenured position were, at the very least, disputed issues of fact below. See Apx. G.

In conclusion, Fields II failed to apply the appropriate standard of review, and arbitrarily made findings of fact

which contradict the evidence below and which ignore the allegations of the Complaint. Therefore, Petitioner requests that this Petition be granted in that the Fourth Circuit departed from the accepted and usual course of judicial proceedings.

CONCLUSION

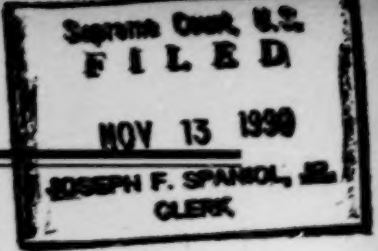
For the reasons argued above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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90-879
No. 2



IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

RALPH RODNEY FIELDS,

Petitioner,

v.

JOSEPH T. DURHAM, ET AL.,

Respondents.

APPENDIX

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BARRY L. STEELMAN,
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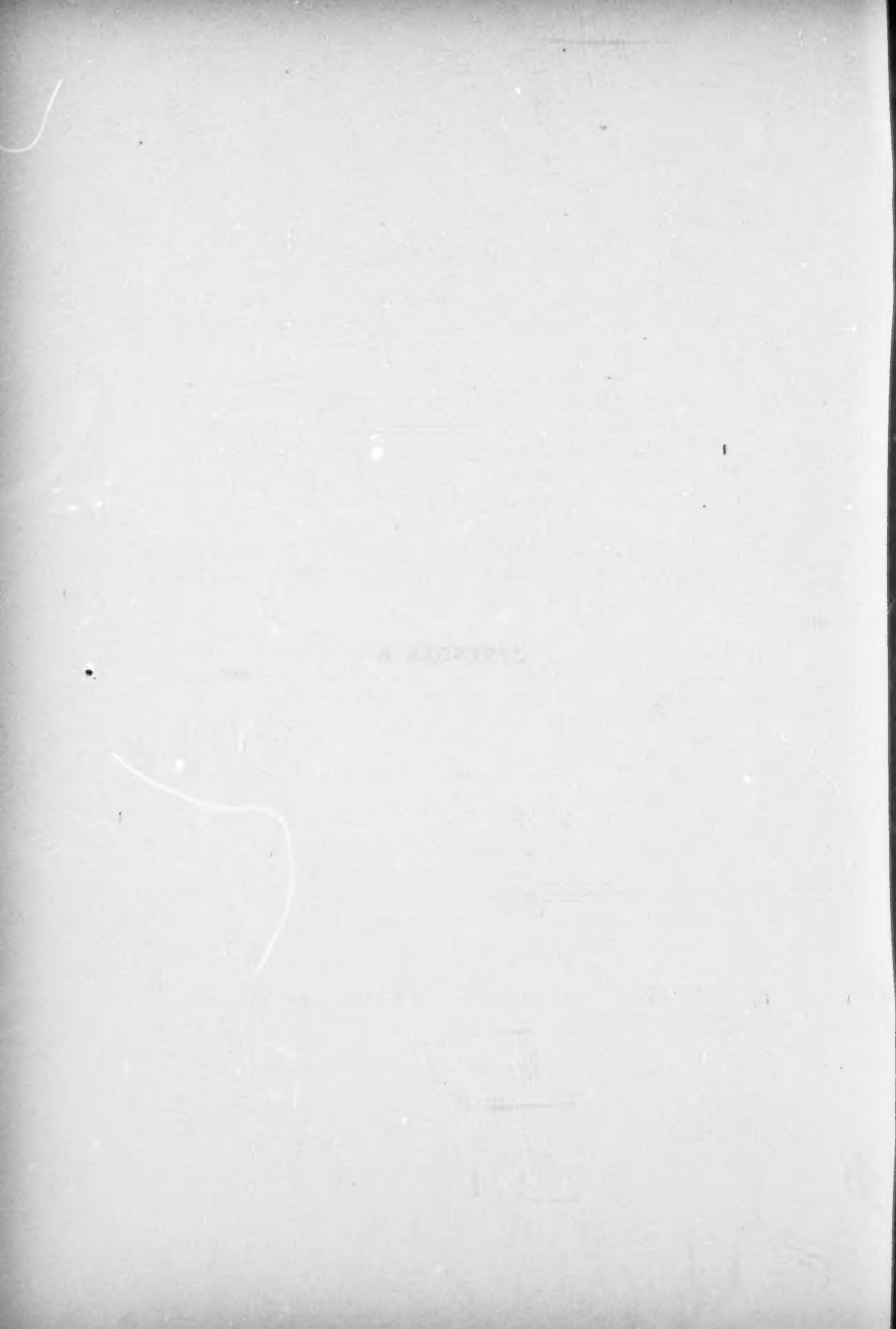


Index to Appendix

- A. Memorandum Opinion Of The United States District Court dated January 29, 1988.
- B. Pertinent Portions Of The Official Transcript Of Hearing Before State Court For Summary Judgment And Oral Ruling dated January 2, 1990. (Pages included at 24-end)
- C. Order Of State Court Granting Partial Summary Judgment dated January 2, 1990.
- D. Order Of State Court Denying Post Trial Motions And Entering Judgment inPlaintiff's Favor dated March 1, 1990.
- E. Motion To Stay Federal Appeal Process.
- F. Order Denying Motion To Stay.
- G. Petition For Rehearing And Suggestion For Rehearing In Banc, dated August 1, 1990.
- H. Order Denying Petition For Rehearing.

Index to Exhibits

- A. Memorandum Opinion of the United States District Court dated January 29, 1954.
- B. Testimony of the Official Transcript of Hearing before State Court for Summary Judgment and Trial held January 2, 1955. (Pages included 40-45-46)
- C. Order of State Court granting Partial Summary Judgment dated January 2, 1955.
- D. Order of U.S. Court denying Post Trial Motion and Motion for Judgment notwithstanding the Verdict dated May 1, 1955.
- E. Motion to Stay Federal Appeal Process.
- F. Order denying Motion to Stay.
- G. Petition for Habeas Corpus and Application for Writ of Habeas Corpus dated August 1, 1955.
- H. Petition for Habeas Corpus and Application for Writ of Habeas Corpus dated August 1, 1955.



**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

RALPH RODNEY FIELDS *

v. * Civil no. JFM-
862941

JOSEPH T. DURHAM *
et al

* * * * *

MEMORANDUM

In this action against the President and the Board of Trustees of the Community College of Baltimore, plaintiff challenges the termination of his employment as Dean of Faculty/Provost of the College. Plaintiff asserts a claim under 42 U.S.C. Section 1983 (1982), alleging that Defendants violated his due process rights by not giving him a full and fair hearing. He also asserts pendent state claims for breach of contract, civil conspiracy, tortious interference with contractual relationships and wrongful discharge.

Defendants moved for summary judgment as

to all of plaintiff's claims, and the parties submitted extensive memoranda on the issues raised by defendants. After reviewing the summary judgment papers, this Court wrote to counsel asking them to address the question of why the availability to plaintiff of post deprivation remedies under state law does not constitute a bar to plaintiff's 1983 claim. The parties have now submitted memoranda on that issue.

The gravamen of all of the claims asserted by plaintiff in this action, both state and federal, is that before terminating his employment, defendants did not affirm to him procedural rights to which he was entitled under his contract and under the College's rules and regulation. According to plaintiff,

these rights are at least as broad as the rights to which he was due under the due process clause. Accordingly, it is clear that the allegedly wrongful acts of which plaintiff complains were not sanctioned by any established [state] procedure. To the contrary, plaintiff is contending that defendants acted arbitrarily by disregarding the established procedure which they were required to follow under state law. Under these circumstances it is clear that plaintiff has stated no claim under Section 1983. See Hudson v. Palmer, 468 U.S. 517 (1984); Parratt v. Taylor, 451 U.S. 527 (1981); Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986); cf. Logan v. Zimmerman Brush Co., 455 U.S.422 (1982).¹ The very fact that

¹ Plaintiff refers to Judge Ervin's "strong dissent" in Yates. However, Judge Ervin did not dispute the soundness

plaintiff has asserted pendente state claims in this action attest to the availability to him of adequate post deprivation remedies under state law.

For these reasons, defendants' motion for summary judgment will be granted as to plaintiff's Section 1983 claim. The Court will decline to exercise pendent jurisdiction over plaintiff's state law claims. He is free to pursue those claims in state court.

Date: January 29, 1988 /S/

J. Frederick Motz
United States
District Judge

of the principles upon which this case turns. Rather, he was of the view that defendants' conduct in Yates was undertaken pursuant to city policy and, thus, was not authorized as required by Parratt and Hudson.

IN THE CIRCUIT COURT FOR THE DISTRICT OF COLUMBIA
MARYLAND

PAUL R. JOHNSON, JR.

Plaintiff,

Case No. 70-1010
JANUARY 2, 1970

vs.

JOHN F. BROWN, JR.

Defendant.

JANUARY 2, 1970

RECORDED IN OFFICE OF THE CLERK OF THE DISTRICT COURT
JANUARY 2, 1970

APPROVE THE COURT

APPENDIX B

EXHIBIT A ON BEHALF OF THE PLAINTIFF

HARRY L. JOHNSON, JR.
JOHN F. BROWN, JR.

EXHIBIT B ON BEHALF OF THE PLAINTIFF

LEONARD E. BROWN, JR.
JOHN F. BROWN, JR.

EXHIBIT C ON BEHALF OF THE PLAINTIFF
LEONARD E. BROWN, JR.
JOHN F. BROWN, JR.
MICHAEL J. BROWN, JR.
JOHN F. BROWN, JR.

IN THE CIRCUIT COURT FOR BALTIMORE CITY,
MARYLAND

RALPH RODNEY FIELDS,

Plaintiffs,

Case No. 89116-
064/CL96499

Versus

JOSEPH T. DURHAM, et al

Defendant.

_____/ January 2, 1990

REPORTER'S OFFICIAL TRANSCRIPT OF
PROCEEDINGS (NOV. HEARING)

BEFORE THE HONORABLE HILARY CAPLAN, JUDGE

APPEARANCES ON BEHALF OF THE PLAINTIFF:

BARRY L. STEELMAN, ESQUIRE
DANIEL S. KATZ, ESQUIRE

ON BEHALF OF THE DEFENDANT:

LAURICE D. ROYAL, ESQUIRE
BURTON H. LEVIN, ESQUIRE

REPORTED BY:

LINDA LINDSEY

Official Court Reporter

Mitchell Courthouse, Room 507

Baltimore, Maryland 21202

.... I think the bylaws didn't comply with the bylaws. We are not saying tenure as administrator. He held tenure as faculty member.

Your Honor, we ask that you grant partial summary judgment stating he did, in fact, have tenure. He violated tenure. They can't -- constitutional -- August 1986 to present order and a hearing on damages.

THE COURT: Anything else Ms. Royal?

MS. ROYAL: No, Your Honor.

THE COURT: Very well. Although the partial summary judgment denied by Judge Hubbard at a prior hearing, the Court had ample opportunity to review all the additional material that was submitted, Motion for Reconsideration requested by the Plaintiff in this case. The Court had an opportunity to read all the affidavits at length over the course of the

holidays, as well as to read the memorandum of both the Plaintiffs and Defendants. The Court believes that the Court should grant a Motion for Reconsideration. I shall grant that, and have a right to do that under the case law of the State.

The next issue, partial summary judgment itself, the issue presented, so there tenure for this gentlemen and does the letter of June 3rd, 1970 grant tenure does the memorandum of bylaws of 12-15-80 take that away. The court finds there is tenure in this case and that under the June 3rd, 1970 letter, tenure was granted in two particular areas. One as a faculty member, in my mind meaning either part of teaching unit or teaching or planning type of position, which teachers involve themselves in and also administrator for if indeed the school at

that particular time had made a mistake I think they are stuck with that mistake.

At a later date, 12-15-80, they seem by agreement changing their thinking, attempted by argument saying there is know ambiguity in the 12-15-80 bylaws but the Court thinks otherwise. It can be read a number of ways. In any event, you cannot remove from Mr. Fields what he already has, that is tenure as a faculty member. If there was a mistake made back in 1970 and the requirements were very minimal tenure was granted on three years residency of Plaintiff, it was granted. The Court believes that he keeps that and no action I see before me under this motion for partial summary judgment will take that away. So, the Court finds that is will grant a motion for summary judgment, number one finding there is indeed tenure as a faculty member. Number

two, violated the contractual and constitutional rights under the bylaws since he was not granted the appropriate rights under the original bylaws which govern this particular case.

I will sign the appropriate order. I think it is before me and we will proceed in this case on the issue of damages next Monday. I have so signed it.

MR. STEELMAN: I believe it is Tuesday.

THE COURT: Yes, it seems like Monday. Today is Tuesday, January 2.

(Proceedings were concluded.)

c:\Fields.App



| | | |
|---------------------|---|----------------|
| RALPH RODNEY FIELDS | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| JOSEPH T. DURHAM, | * | BALTIMORE CITY |
| et al | | |
| Defendant | * | Case no. 89116 |
| | | 064 CL96499 |
| | * | * |

ORDER

Upon consideration of the Motion For Reconsideration and Partial Summary Judgment filed by Plaintiff, it is this 2nd day of January, 1990,

ORDERED, that said Motion shall be, and hereby is, GRANTED, and it is further

ORDERED, that partial summary judgment shall be entered in favor of Plaintiff on the issues of violation of his due process rights and breach of his contractual rights in connection with his status as a tenured faculty member.

/S/ _____
Hilary D. Caplan, Judge

STATE OF NEW YORK

IN SENATE

JANUARY 1, 1907

REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

APRIL 1, 1906

ALBANY:

THE UNIVERSITY OF THE STATE OF NEW YORK

1907

APPENDIX D

STATE OF NEW YORK

IN SENATE

JANUARY 1, 1907

REPORT OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION PASSED BY THE SENATE

APRIL 1, 1906

ALBANY:

THE UNIVERSITY OF THE STATE OF NEW YORK

1907



| | | |
|---------------------|---|----------------|
| RALPH RODNEY FIELDS | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| JOSEPH T. DURHAM | * | BALTIMORE CITY |
| et al | * | |
| Defendant | * | Case no. 89116 |
| | * | 064 CL 96499 |
| | * | * |

ORDER

The Defendants' Motion For Judgment N.O.V. or, in the alternative, for a New Trial, and the Plaintiff's opposition thereto having been filed, the matter came before this Court for oral argument on Friday, February 23, 1990. Having considered the parties' briefs and all oral arguments in support thereof, including, pursuant to Rule 2-533(b), the arguments asserted by the Defendants in their Memorandum of Law in Support of the Motion for New Trial, the Court at the hearing denied Defendants' Motions for Judgment N.O.V. and New Trial.

THEREFORE, it is this 1st day of March, 1990 ORDERED and the same hereby be that all Motions of the Defendants for Judgment N.O.V. and/Motions for a New Trial are and the same are hereby DENIED.

FURTHER, it is ORDERED this 1st day of March, 1990, that the verdict of the jury as to the due process count, is and the same hereby is REMITTED by the amount of \$85,642.00, thereby leaving the verdict and judgment entered on this date as follows:

- (1) As to All Defendants:
 - Contract Court \$100,000
 - Due Process Count, Compensatory Damages \$400,000
- (2) Punitive Damages as to Defendant Durham \$500,000
- (3) Punitive Damages as to Board of Trustees \$750,000

/S/

Hillary D. Caplan,
Judge

True Copy Test

/S/

Saundra E. Banks, Clerk

APPENDIX E



UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No.: 88-1564

RALPH RODNEY FIELDS

Plaintiff/Appellant

v.

**JOSEPH T. DURHAM, Individually and as
President of
Community College of Baltimore; COMMUNITY
COLLEGE OF
BALTIMORE; MAYOR AND CITY COUNCIL OF
BALTIMORE CITY;
JAMES S. JEFFERS, Chairman of the Board
of Trustees
Community College of Baltimore; THE BOARD
OF TRUSTEES
COMMUNITY COLLEGE OF BALTIMORE**

Defendants/Appellees

MOTION TO STAY FEDERAL APPEAL PROCESS

DURING THE PENDENCY OF STATE COURT APPEAL

**Appellant, Ralph Rodney Fields, by his
attorneys, Barry L. Steelman, Nicholas
D. Cowie and Barry L. Steelman, P.A.,
respectfully moves, pursuant to Rule 27**

of the Rules of the United States Court Of Appeals for the Fourth Circuit, for this Honorable Court to stay the Appeal process during the pendency of the State Court proceedings and in support thereof, stated as follows:

1. Fields initially filed his Complaint and Prayer for Jury Trial in the United States District Court for the District of Maryland on September 23, 1986. On January 29, 1988, Judge J. Frederick Motz, of the District Court, issued a Memorandum and Order stating that "under these circumstances it is clear that Plaintiff has stated no claim under Section 1983." The Court was relying upon Parratt v. Taylor, 451 U.S. 527 (1981). The Court went on to say further that: "the very fact that Plaintiff has asserted pendent claims in this action attest to the availability to

him of adequate post deprivation remedies under state law.

2. Shortly thereafter, Fields filed an appeal in the United States Court of Appeals for the Fourth Circuit asserting that Parratt was not applicable and that the District Court erred in dismissing his 1983 claim. After briefing and oral argument, this Court affirmed the lower court's decision. Thereafter, Fields filed in the Supreme Court Of the United States, a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. Following briefing by all parties, the Supreme Court issued an Order on March 5, 1990 stating that: "The Petition for a Writ of Certiorari is granted. The Judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit for

further consideration in light of Zinerman v. Burch 494 U.S. ____ (1990)".

3. During the pendency of the appeals in the Federal Courts, Fields, so as not to be barred by limitations in the state Court, should his federal appeal be unsuccessful, filed suit in the Circuit Court for Baltimore City in 1989. Ralph Rodney Fields v. Joseph T. Durham, et al, in the Circuit Court for Baltimore City, Case No. 89116 064 CL96499. In the state court action, Fields sought both compensatory and punitive damages for deprivation of his constitutional property interests under the Maryland constitution, and for his state court actions including contract violations. Following additional discovery, the case proceeded to trial before a Jury in the State Court on January 9, 1990. Prior to trial, the Honorable Hillary D. Caplan,

granted summary judgment in Fields favor on both the due process and contract claims as to tenure only. The case proceeded to trial on both compensatory and punitive damages for the breaches of contract and constitutional due process.

4. At the conclusion of the trial, the Jury awarded Fields substantial compensatory damages for the Appellees' contractual and due process violations in depriving him of his tenure, and substantial punitive damages for the deprivation of his constitutionally protected property interests, without due process. Appellees' Motion For Judgment Not Withstanding The Verdict Or in The Alternative, For A New Trial, was denied. See Order of the Circuit Court for Baltimore City dated March 1, 1990 attached hereto as Exhibit 1.

5. Appellees have filed a Notice Of Appeal to the Maryland Court of Special Appeals appealing the lower court's rulings and the jury's verdicts.

6. Fields requests that this Court stay the federal appeal during the pendency of the state court appeal process in that he will not seek a new trial on the merits in the federal court if his state court verdicts are upheld at the conclusion of the State appeal process.

7. Fields contends that such a stay would presently benefit the Court's docket, judicial economy, and the parties time and expenses by avoiding matters which may become duplicative or moot. However, should he not be successful on the state court appeal, and/or the state appellant court holds that Dr. Fields proper recourse was a 42 U.S.C. Section

1983 action and not a state action, then Fields would continue to pursue the action that he initially filed in the United States District Court.

8. Furthermore, Fields contends that under res judicata and/or collateral estoppel, he would be entitled to seek recourse in the United States District Court under 42 U.S.C. Section 1988 at the conclusion of a successful appeal in the state court system.

WHEREFORE, Appellant respectfully requests that this Court stay the herein appeal pending the outcome of the state process. However, should the Court in its discretion decide not to stay this appeal, Appellant Fields has this date filed the Supplemental Brief as requested by this Honorable court on March 26, 1990.

BARRY L. STEELMAN, P.A.

BARRY L. STEELMAN

NICHOLAS D. COWIE
Suite 720
Two Hopkins Plaza
Baltimore, Maryland 21201
(301) 539-8603

I HEREBY CERTIFY that on this 13th day of April, 1990, that a copy of the foregoing Motion to Stay Federal Appeal Process During The Pendency Of State Court Appeal was mailed, postage prepaid, to John S. Wood, Esquire, Bruton Levine, Esquire, Room 135, City Hall, 100 North Holliday Street, Baltimore, Maryland 21202.

BARRY L. STEELMAN

| | | |
|---------------------|---|----------------|
| RALPH RODNEY FIELDS | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| JOSEPH T. DURHAM | * | BALTIMORE CITY |
| et al | * | Case no. 89116 |
| Defendant | * | 064 CL 96499 |
| | * | * |

ORDER

The Defendants' Motion For Judgment N.O.V. or, in the alternative, for a New Trial, and the Plaintiff's opposition thereto having been filed, the matter came before this Court for oral argument on Friday, February 23, 1990. Having considered the parties' briefs and all oral arguments in support thereof, including, pursuant to Rule 2-533(b), the arguments asserted by the Defendants in their Memorandum of Law in Support of the Motion for New Trial, the Court at the hearing denied Defendants' Motions for Judgment N.O.V. and New Trial.

THEREFORE, it is this 1st day of March, 1990 ORDERED and the same hereby be that all Motions of the Defendants for Judgment N.O.V. and/Motions for a New Trial are and the same are hereby DENIED.

FURTHER, it is ORDERED this 1st day of March, 1990, that the verdict of the jury as to the due process count, is and the same hereby is REMITTED by the amount of \$85,642.00, thereby leaving the verdict and judgment entered on this date as follows:

- (1) As to All Defendants:
 - Contract Court \$100,000
 - Due Process Count, Compensatory Damages \$400,000
- (2) Punitive Damages as to Defendant Durham \$500,000
- (3) Punitive Damages as to Board of Trustees \$750,000

/S/

Hillary D. Caplan,
Judge

True Copy Test

/S/

Sandra E. Banks, Clerk

APPENDIX F



UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RALPH RODNEY FIELDS *

v. * Case No. 88-1564

JOSEPH T. DURHAM *
et al

* * * * *

ORDER

Upon consideration of Appellant's Motion To Stay Federal Appeal Process During Pendency Of State Court Appeal and Appellees Oopposition To The Motion To Stay, it is Ordered that the Motion To Stay is Denied and the parties shall proceed on the supplemental briefing schedule previously established. Appellees shall serve and file their brief on or before April 30, 1990, Appellant's Supplemental Reply Brief, if any, shall be served and filed seven days thereafter.

Entered at the direction of Judge
Wilkinson with the concurrence of Judge
Chapman and Judge Wilkins. For the
court.

/S/
signed by clerk

APPENDIX G

Exhibit at the American of Justice
against the Government of the United States
and the American of Justice, for the
year

at the American of Justice
for the year

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

NO. 88-1564

**RALPH RODNEY FIELDS,
Appellant**

v.

**JOSEPH T. DURHAM, et al
Appellees**

**Appeal From The United States District
Court**

**For The District Of Maryland
(On Remand From The United States Supreme
Court)**

APPELLANT'S PETITION FOR REHEARING

AND

SUGGESTION FOR REHEARING IN BANC

**Barry L. Steelman,
Nicholas D. Cowie,
Barry L. Steelman, P.A.,
Two Hopkins Plaza - Suite 720
Mercantile Bank & Trust Bldg.
Baltimore, Maryland 21201
(301) 539-8603**

Attorneys for Appellant.

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- IV. IN BANC REVIEW**
- V. CONCLUSION**

I.

INTRODUCTION

On July 19, 1990, this Court, on remand from the United States Supreme Court, affirmed the District Court's dismissal of Appellant's, Ralph Rodney Fields ("Fields"), §1983 claim based on entirely new factual findings which were never considered below and which contradict the factual allegations of the Complaint as well as the undisputed Affidavits, discovery pleadings and documentary evidence which were before the District Court. Furthermore, these factual findings were contrary to the evidence established at the subsequent trial in the state court, which the Opinion completely overlooks and ignores. Finally, by making determinations on factual issues, the Court failed to properly apply the applicable standard of

review. In the judgment of counsel for Fields, material factual and legal matters were overlooked in this decision.¹

Originally, the Court affirmed the District Court's decision on ground that, under the Parratt and Hudson line of cases, the availability of post-deprivation remedies in State Court was sufficient to satisfy the requirements of due process, because, in his Complaint, Fields alleged only that he was terminated from the Appellee College as a result of unauthorized and unpreventable violations of State procedures by the Appellee College President and Appellee Board of Trustees. Fields v. Durham, 856

1

Pursuant to IOP 40.4, these factual and legal matters are succinctly listed in the "Statement Of Purpose". infra, at 2.

F.2d 655, 657 (4th Cir. 1988). Fields sought a Writ Of Certiorari, arguing that the 4th Circuit's application of Parratt and Hudson conflicted with the decision of a majority of the other Circuits. The Supreme Court granted certiorari and the case was subsequently remanded to this Court to reconsider its application of the Parratt and Hudson line of cases in light of Zinnermon v. Burch, 100 S.Ct. 975 (1990). On remand, however, this Court surprisingly did not reconsider its application of Parratt and Hudson. Instead, it affirmed the District Court on alternative grounds by making an improper factual determination that the pre-deprivation procedures afforded Fields in this case satisfied due process and, therefore, he failed to state a claim under §1983.

II

STATEMENT OF PURPOSE

In the undersigned counsels' judgment, this rehearing is warranted in that the Court, in its July 19, 1990 Order overlooked certain material factual matters in the record and also overlooked legal standards in reaching its decision which seriously undermines effectuation of the purposes and policies of 42 U.S.C. §1983 in this Circuit.

POINTS TO BE RAISED IN APPELLANT'S PETITION:

1. The Court overlooked the material facts concerning Fields' status as a tenured professor at the time of his termination. These factual matters include the undisputed and uncontroverted affidavits of college officials, the deposition testimony and Answers To

Interrogatories of Appellees; as well as material facts developed in a subsequent jury trial of Fields' claims in the state court, (Fields v. Durham, Circuit Court for Baltimore City, Case No. 89116-064/CL96499), which completely controvert many facts set forth in this Court's July 19, 1990 Opinion;

2. That this case, like the Street v. Surdyka, 492 F.2d 368, 374 (4th Cir. 1974) is "an extraordinary" case because following the initial appeal, the case was tried in the State court and material facts were developed and established. One such fact developed at the subsequent trial was that it became questionable whether the Board Of Trustees ever held an actual vote to terminate Fields from the College following the purported Board hearing. Therefore, the conclusion

reached in the July 19, 1990 Opinion on page 3, that "after the hearing on August 12, 1986, the Board unanimously affirmed Fields' discharge" overlooks a material fact below and is inaccurate;

3. The Court overlooked or incorrectly applied facts different from those established in the record below concerning the circumstances surrounding the notice and process given concerning Fields' termination. The Court overlooked the facts that the deficiencies given for the termination were not "serious" but rather, superficial and not actual performance deficiencies. Appendix at 25-26. These facts were alleged as such in the Amended Complaint (Id.) and were developed as superficial and not performance deficiencies at the subsequent trial in

the State court, but were overlooked by the Court in its recent opinion. Further, the Court overlooked the factual allegations below that Fields did not waive his appeal to the President's Cabinet as stated in the July 19, 1990 Opinion but rather was misled into agreeing to the waiver. Appendix at 28-31. Once Fields learned of the true circumstances, he demanded an appeal to the President's Cabinet but it was denied him. Id.; See Appellant's Supp. Reply Brief at 10. These facts were not only alleged in the Amended Complaint, but clearly established at the subsequent trial in the State court. Additionally, the opinion overlooks the fact that the Board never gave Fields an "impartial" hearing in that the Board never reviewed or considered Fields' written and

documentary evidence. Appendix at 32. Moreover, the Appellee president, who acted as both prosecutor and sole witness, communicated his case to the Board prior to the Board hearing but sat with the Board during their deliberations. Appendix at 32. Appellant's Supplemental Appendix at 26-27. Finally, prior to the hearing a replacement had already been chosen to replace Fields. Appendix at 33. These facts were uncontroverted in the record below but were overlooked as such by the Court; and

4. That the Court applied an incorrect standard of review in making factual findings that Fields was provided with procedures sufficient to satisfy the requirements of due process under the 14th Amendment. During the course of

this appeal there has been a dispute as to whether the proper standard of review is from an Order granting a Motion To Dismiss under Rule 12(b)(6) or from an Order granting a Motion For Summary Judgment under Rule 56. In its July 19, 1990 decision, the Court does not set forth which standard of review it is utilizing nor is it clear that any standard has been applied. However, affirming the lower court is improper because under either standard of review the Court of Appeals cannot look outside the Complaint and made factual findings on matters which were disputed below. The approach taken by the Court in the July 19, 1990 Opinion leads to inconsistent interpretation of 42 U.S.C. §1983 in this Circuit and is inconsistent with other cases of this Circuit

concerning reviews for Motions To Dismiss.

III

ARGUMENT

A. It Was Undisputed By All Parties Below That Fields Held A Tenured Position At The Appellee College At The Time He Was Terminated.

The Court's decision of July 19, 1990, unfairly brushes aside Fields' contention that the Complaint, Affidavits and other evidence before the Court below demonstrated that he held a tenured status at the Appellee college which was terminated without notice or hearing. The Court's July 19, 1990 decision focuses solely on Fields' administrative position and states that "his position as a member of the tenured faculty ... is unclear" and that the rules of the college, as embodied in the "Conditions Of Appointment For Administrative And

Non-Instructional Personnel (hereinafter "Conditions Of Appointment") did not "appear to permit" Fields "to hold a tenured faculty position." Slip opinion at 8. The Court stated that Fields' argument that he held a tenured status under such circumstances is the equivalent of claiming "multiple property interests within the same employment relationship" or that state law creates "numerous entitlements." Id. Finally, the Court concluded that it is unnecessary to consider Fields' claim that he held a tenured position at the Appellee college because an employer is not required to provide a predetermination proceeding for "various positions and employees might have held over the course of an employer-employee relationship". Id. at 9. Having brushed

aside the tenured status claimed to be held by Fields, the Court went on to determine that procedures were provided Fields prior to his termination which were adequate to satisfy due process with respect to his administrative position. Id.

In reaching this decision the Court overlooked the unequivocal and undisputed facts presented below which demonstrated that Fields was a tenured member of the college at the time of his termination. The facts concerning Fields tenured status are not "unclear" nor did the Conditions Of Appointment prohibit Fields from holding a tenured position. Not only did Fields allege in his Amended Complaint that he held tenure at the time he was terminated, and that his tenured position was not effected by the

Conditions Of Appointment (App. at 11-14, 34, 37-39), but he also backed up these allegations with the following uncontroverted evidence: the affidavit of Rafael L. Cortada, past President of the Appellee College and author of the "Conditions Of Appointment" (Appellant's Supplemental Appendix at 76-78); Affidavit of William Hammond, a former tenured professor and Associate Dean of Finance and Plant Management and acting President of Appellee college (Id. at 79-81); Affidavit of Raymond C. Bowen, former Vice President of the Appellee College (Id. at 82-84); Affidavit of Ralph Rodney Fields (Id. at 85-94); the Appellee Board Of Trustees Answers To Interrogatories (Id. 32-34); the Board Of Trustees Minutes wherein Fields was granted tenure as an Associate Professor

and Assistant Dean Of Faculty (Id. at 28-30); a letter from the President of the Appellee College and Secretary/Treasurer of the Board Of Trustees informing Fields that he had "been given tenure at the college" (Id. at 31); and the deposition testimony of the Appellee President and members of the Appellee Board Of Trustees (Id. at 35-75). As was argued by Fields below (Id. at 9-15, 124), these summary judgment documents demonstrated without dispute by the Appellees that Fields held tenure at the time of his termination and that no rule, including the "Conditions Of Appointment" affected Fields' tenured position in any manner. See, Appellant's Supplemental Reply Brief at 3-6; Appendix at 9-16.

Dr. Rafael Cortada served as President of the Community College Of

Baltimore and Secretary/Treasurer of the Board Of Trustees from "fall, 1977 until July, 1982". Appellant's Supplemental Appendix at 76. He authored and implemented the Conditions Of Appointment and unequivocally states the conditions of appointment always prospective and never retroactively affected any tenured employee at the Appellee college. Id. 76-78. In fact, it was Dr. Cortada's opinion that such retroactive application would have been unconstitutional that led him to implement the conditions only as a prospective measure. Id. at 77.

Raymond C. Bowen, who was the Vice President of the Appellee college under President Cortada states in his affidavit that he "worked closely with President Cortada on the development of the language and terminology of the

Conditions Of Appointment." Id. at 83. He recalls that there were various meetings held to discuss the particular issue of how the Conditions Of Appointment related to tenure. Id. Bowen states that "the conditions were only to be applied prospectively, i.e., it would only affect those holding administrative positions in the future and provided that no one would again tenure solely as an administrator after the conditions were implemented". Bowen states that it was his understanding that "the Conditions Of Appointment ... did not affect the tenure of any individual who had previously been granted tenure after having met the appropriate By-Law requirements in effect at the time tenure was awarded. Id. at 82.

H. W. Hammond, former Vice

President of Administrative Services under President Cortada, states in his Affidavit that "during meetings of college administrators, where the conditions of appointment were discussed, there was never any announcement or statement that the conditions would adversely impact any faculty staff, staff/member or administrator who had been granted tenure prior to the condition's effective date or retroactively take away anyone's tenure." Id. at 80. He states that he understood that the conditions of appointment would only be applied "prospectively" and would never affect any tenured employee who had been granted tenure status prior to the effective date of the conditions. Id.

Fields states in his Affidavit that because of the language of the

Conditions Of Appointment, questions were raised with President Cortada who told Fields and his colleagues that their tenured status at the Appellee college was in no way affected by the implementation of the Conditions Of Appointment but was rather prospective in nature. Id. at 88-89. President Cortada testified, uncontroverted by Appellees, to these facts at the State trial.

H. W. Hammond, Raymond C. Bowen, and Fields all state in their Affidavits that they were involved in other cases involving individuals tenured prior to the enactment of the Conditions Of Appointment. Id. at 80, 83 and 89. In each case it was determined that no individual granted tenure prior to the conditions of appointment lost that tenure by virtue of performing an

administrative function after the implementation of the Conditions Of Appointment. Id. In fact, these Affidavits in the record refer to another cause brought successfully by another former Dean (granted tenure on the same day as Fields) under 42 U.S.C. §1983 in the United States District Court for the District of Maryland.

The deposition excerpts attached to Plaintiff's Motion For Partial Summary Judgment below show that the Appellee college was unaware of any instance where the Board Of Trustees had ever taken away Dr. Fields' tenure. Appellant's Supplemental Appendix 9-10, 55, 64, 65, 70, 75. Moreover, the Appellee Board Of Trustees admitted in its Answers To Interrogatories Plaintiff held tenure on August 15, 1986, the date he was

terminated. Id. at 33-34.

Again, these Affidavits and other summary judgment papers went uncontested by Appellees in their Opposition to Dr. Fields' Motion For Partial Summary Judgment below. Therefore, this Court's finding that the status of Field's tenured position after becoming an administrator was "unclear" or did "not appear to be provided by the Conditions Of Appointment" are findings which are not supported by the facts below.²

B. In Affirming The District Court's Decision Below, The Court Of Appeals Did Not Apply An Appropriate Standard Of Review When It Looked Outside The Complaint And Made Determinations On Factual Issues.

2

Moreover, as discussed in Part III A above, such factual findings are improper on review of a district court's grant of Motion To Dismiss or Motion For Summary Judgment.

During the course of this Appeal, Appellant and Appellees disputed whether the Order appealed from was a grant of Summary Judgment under Federal Rule of Civil Procedure 56 or a dismissal under Federal Rule of Civil Procedure 12(b)(6). Appellant took the later position. See, Supplemental Brief For Appellant at 1 and Appellant's Supplemental Reply Brief at 1-2. The Appellees' Motion below was a "Motion To Dismiss And/Or In The Alternative, Motion For Summary Judgment."

Appellees' Supplemental Appendix at 5. Although the lower court's Order purports to grant summary judgment (Appendix at 162), its decision was based on the face of Fields' Complaint. See, Id. at 159-60. The Court below held as a matter of law that

"under these circumstances it is clear that Plaintiff has stated no claim under Section 1983". Id. at 160. The Court below made no determination as to material facts that were in dispute and did not rely upon any of the numerous affidavits, deposition excerpts and other summary judgment papers filed by either the Appellant or the Appellee. See, Id. at 159-61. The Appeal originally noted from the lower court's Order of January 29, 1988 was on a specific issue of whether the claimant had stated a cause of action under Section 1983 so as to avoid at 12(b)(6) dismissal for failure to state a claim.

In this Court's original Opinion, 856 F.2d 655, 657 (4th Cir. 1988), it was noted that the "district court granted defendant's motion for

summary judgment on the § 1983 claim" but it was also concluded that in light of Parratt and Hudson "Fields had failed to state a claim cognizable under § 1983". In the subsequent decision of July 19, 1990, although this Court concluded "that Fields has not alleged a due process violation because he has received sufficient process." (Slip Opinion at 1), the Court does not set forth a standard of review, nor does it identify whether it deems the lower court's Order to be based on Motion For Summary Judgment or a Motion To Dismiss. Different standards of review apply to each type of order on appeal. However, under either standard of review, it would be improper for this Court to look outside of the Complaint and summarily determine issues of fact not decided below. Here the Court

determined that the procedures were provided to Fields prior to his termination satisfied due process. See, Slip Opinion at 2-3, 9-11.

1. Standard Of Review Of An Order Granting A Motion To Dismiss:

In reviewing a dismissal for failure to state a claim upon which relief can be granted, the Court Of Appeals must accept all material allegations of the Complaint as true and resolve all factual disputes in favor of Appellant. Kelson v. City of Springfield, 767 F.2d 651, 653 (9th Cir. 1985); O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985). The Court Of Appeals is required to evaluate the correctness of the dismissal solely on the basis of the allegations in the Complaint; it cannot look outside the pleadings nor can it uphold dismissal

unless it appears beyond doubt that Plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Id.; Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02 (1957); Ware v. Associated Milk Producers, Inc., 614 F.2d 413, 415 (5th Cir. 1980); O'Quinn v. Manuel, 767 F.2d 174, 177 (5th Cir. 1985). Although the Court Of Appeals may affirm a district court's dismissal on any basis fairly supported by the record, dismissal under Federal Rule Of Civil Procedure 12(b)(6) should not be affirmed unless it is clear that the complaint could not be saved by any amendment. Kelson v. City of Springfield, 767 F.2d 651, 656 (9th Cir.1985).

The case of Ware v. Associated Milk Producers, Inc., 614 F.2d 413 (5th

Cir. 1980) presented facts similar to the present case. There the defendant had filed a "Motion To Dismiss Or For Summary Judgment" and there was a dispute over whether the lower court's order granting the motion was a grant of dismissal or summary judgment. Id. at 414. Although the lower court had "indicated" it was granting summary judgment, the Court of Appeals found that the order itself was based on the Complaint alone and was therefore was a grant of defendant's Motion To Dismiss. Id. Based on this determination, the court held that the proper standard of review was to "evaluate the dismissal solely on the basis of the allegations in the complaint." Id.

Fields takes the position that the Order appealed from in this case is

analogous to the Order appeared from in Ware v. Associated Milk Producers, Inc., supra. See, Supplemental Brief For Appellant at 1 and Appellant's Supplemental Reply Brief at 1-2. As such, this Court was required to evaluate the District Court's Order solely on the basis of the Complaint. However, this standard of review for a Motion To Dismiss was not followed. By finding that Fields received adequate notice and opportunity to be heard prior to his termination, and by concluding that Fields tenured status was "unclear" and apparently not permitted by the Conditions Of Appointment, this Court did not accept the allegations and inferences therefrom in the Complaint as true.

As set forth above, Fields alleged facts which, if accepted as true,

demonstrate that he did not receive adequate notice or reasons for his termination, and did not receive a hearing, with respect to his administrative position. See, Appendix at 25-26, 28-31, 33-34, 38-39; see, also, Appellant's Supplemental Reply Brief at 6-11. Moreover, Fields alleged facts which, if accepted as true, demonstrate that he held a tenured position at the Appellee college which was terminated without any notice or hearing whatsoever. See, e.g. Appendix at 11-14, 34, 37-39, 50; see, also, Appellant's Supplemental Reply Brief at 3-6. In light of these facts, it could not be concluded to a certainty that Fields is entitled to no relief under any statement of facts which could be proved in support of his claim. See, 2A Moore's Federal Practice, §12.8

at 2271-74 (2d. Ed. 1983).

2. Standard Of Review Of An Order
Granting Summary Judgment:

On the other hand, in reviewing a case decided on Motion For Summary Judgment, the Court Of Appeals reviews the case de novo, and does so by examining and reviewing the evidence in a light most favorable to the non-moving party. Mead Reinsurance v. Granite State Insurance Company, 873 F.2d 1185, 1187 (9th Cir. 1988); Morgan v. Mobile Oil Corp, 726 F.2d 1474, 1477 (10th Cir. 1984). Under this standard the Court of Appeals applies the same test as is applied below, that is, whether there is any genuine issue of material fact and whether the district court correctly applied the relevant law. Ed. Houser v. Enterprises, Inc. G. General Motors

Corp., 595 F.2d 366, 368 (7th Cir. 1978);
see also, Mead Reinsurance v. Granite
State Insurance Company, 873 F.2d 1185,
1187 (9th Cir. 1988); Byers v. Burleson,
713 F.2d 856, 859 (D.C. Cir. 1983);
Pierson v. Grant, 527 F.2d 161, 163-64
(8th Cir. 1975). Summary judgment could
not be sustained on appeal where the
record is "unclear" on fact or legal
theory forming the basis of the ruling.
Atkinson v. Jory, 292 F.2d 169, 171 (10th
Cir. 1961).

Although the reviewing court
has the power to affirm an order granting
summary judgment on grounds different
from those relied upon in the district
court, Ross v. Communication Satellite
Corp., 759 F.2d 355, 363 (4th Cir. 1985),
the new grounds must find support in the
record and the Court should proceed with

caution so as to avoid the denying the opposing party a fair opportunity to dispute the facts material to the new grounds relied upon. Securities and Exchange Commission v. Southwest Coal & Energy Co, 624 F.2d 1312, 1317 (5th Cir. 1980); U.S. v. General Motors Corp., 518 F.2d 420, 441 (D.C. Cir. 1975). Generally, summary judgment can be affirmed on appeal only if the evidence available to the trial judge at the time he ruled on the motion established that there was no genuine issue of material fact. Street v. Surdyka, 492 F.2d 368, 374 (4th Cir. 1974) (except in extraordinary cases 'such as the instant case' where the disputed facts have been fully developed in a subsequent trial). On appeal from summary judgment, it is not within the province of the Court of

Appeals to make determinations on factual issues. Devex Corp. v. Houdaille Industries, Inc., 382 F.2d 17, 21 (7th Cir. 1967); Bowman Steel Corp. v. Lumbermen's Mutual Casualty Company, 364 F.2d 246, 250 (3rd Cir.1966); Page v. Work, 290 F.2d 323, Cert. denied 82 S.Ct. 121, 368 US 875. If a genuine dispute exists as to any material fact, summary judgment cannot be affirmed. Breen v. Centex Corp., 695 F.2d 907, 910, 914 (5th Cir. 1983).

In the present case, therefore, if the Court's July 19, 1990 decision was based on the assumption that the lower court's order granted summary judgment, then it has improperly made determinations of factual issues but concluding that Fields received notice and opportunity to be heard and that his

tenured status was "unclear" and apparently not permitted by the Conditions Of Appointment. In his Supplemental Reply Brief at pages 3-11, Fields has demonstrated that it would have been improper to grant summary judgment on the issues of tenure, notice and/or hearing. Whether Fields received notice as to the termination of his administrative position and/or tenured position with the Appellee college, and whether he received a fair and impartial hearing with respective to his administrative and/or tenured position were, at the very least, disputed issues of fact below. Appellant's Supplemental Reply Brief at 3-11. In fact, Fields demonstrates in his Reply Brief that had the lower court reviewed the summary judgment papers, it could have entered

summary judgment in his favor with respect to the termination of his long-standing tenured position at the Appellee college.

In sum, in reaching its decision, this Court has either looked outside of the Complaint which is improper in reviewing a Motion To Dismiss or, this Court has made a determination of fact which is improper in reviewing a Motion For Summary Judgment.

IV.

IN BANC REVIEW

Although a rehearing in banc is not generally favored it should be ordered in this case because the Petition presents questions of exceptional importance that are necessary to secure and maintain uniformity and effectuation of 42 U.S.C. §1983 claims and to maintain

uniformity on this Court's decisions regarding standards of review to be applied in reviewing an order which grants a Motion To Dismiss or Motion For Summary Judgment. Further, the present decision is contrary to this Court's prior holding in the extraordinary situation, where facts are fully developed at an intervening trial.

This case was remanded to the Fourth Circuit in light of Zinnerman v. Burch, 100 St. Ct. 975 (1990) an important case which sought to resolve a dispute among the federal circuits and clarify the law involving the application of the Parrat/Hudson line of 1983 cases. Appellant argued that under Zinnerman, this case was not controlled by the Parratt or Hudson cases and should not have been dismissed on that ground. On

remand, however, this Court has avoided this important issue and decided the case on a completely different ground. However, in doing so, it has failed to set forth the standard of review it is following and has made findings of facts which were disputed below and which contradict the allegations in Plaintiff's Complaint and therefore, are improper under the applicable standards of review for a Motion To Dismiss or a Motion For Summary Judgment.

In addition, the Court has based its opinion on facts which are not accurate and which are contrary to the unequivocal facts set forth in the affidavits submitted by Appellant below.

IV.

CONCLUSION

In conclusion, this Court's

July 19, 1990 decision in effect hold that a tenured professor has no right to bring a due process claim if he is dismissed without notice or hearing; this ruling should not be allowed to stand. More importantly, by failing to apply the appropriate standard of review, this Court has arbitrarily affirmed the lower court's decision by making findings of fact which contradict the evidence below and which ignore the allegations of the Complaint. Therefore, Fields requests that this case be set in for a rehearing in banc due to the unusual nature of this case and the Mandate of the United States Supreme Court.

Respectfully submitted,

Barry L. Steelman
Nicholas D. Cowie

Barry L. Steelman, P.A.
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Baltimore, Maryland 21201

(301) 539-8603
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August, 1990, a copy of the foregoing Appellant's Petition For Rehearing And Suggestion For Rehearing In Banc was mailed by first class mail, postage prepaid, to John S. Woods, Esquire and Burton Levin, Esquire, Office of the City Solicitor, City Hall, 100 North Holliday Street, Baltimore, Maryland 21202, attorneys for Appellees.

BARRY L. STEELMAN

UNITED STATES DEPARTMENT OF JUSTICE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Case No. 100-100000

vs.

JOHN EDGAR HOOVER

Plaintiff

THOMAS T. THORNTON, Defendant, who is
President of Community College of
Washington County, and who is
also a member of the Board of Trustees of the
Community College of Washington,
do hereby certify that the following is a true and
correct copy of the original as the same appears
in the records of the Community College of Washington.

APPENDIX H

WITNESSES my hand and the seal of the
Community College of Washington this 10th day of
January, 1964.

The undersigned, Thomas T. Thornton,
President of the Community College of Washington,
do hereby certify that the following is a true and
correct copy of the original as the same appears
in the records of the Community College of Washington.

1931 539-2807

Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this
1st day of August, 1931, a copy of the
aforesaid Appellant's Petition for
Reformation and Rescission of
Deed was mailed by first class mail,
postage prepaid, to John E. Woods,
Respondent and H. A. Kline, Attorney, Office
of the City Auditor, City Hall, 1st
Floor, 601 Broadway Street, Baltimore,
Maryland 21201, Attorneys for Appellant.

WALTER C. STUBBS

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
August 14, 1990

No. 88-1564

RALPH RODNEY FIELDS

Plaintiff - Appellant

v.

JOSEPH T. DURHAM, Individually and as
President of Community College of
Baltimore; COMMUNITY COLLEGE OF BALTIMORE
CITY; JAMES S. JEFFERS, Chairman of the
Board of Trustees Community College of
Baltimore; THE BOARD OF TRUSTEES
COMMUNITY COLLEGE OF BALTIMORE

Defendants - Appellees

**ON PETITION FOR REHEARING WITH SUGGESTION
FOR REHEARING IN BANC**

The appellant's petition for
rehearing and suggestion for rehearing in
banc were submitted to this Court. As no
member of this Court or the panel
requested a poll on the suggestion for
rehearing in banc, and

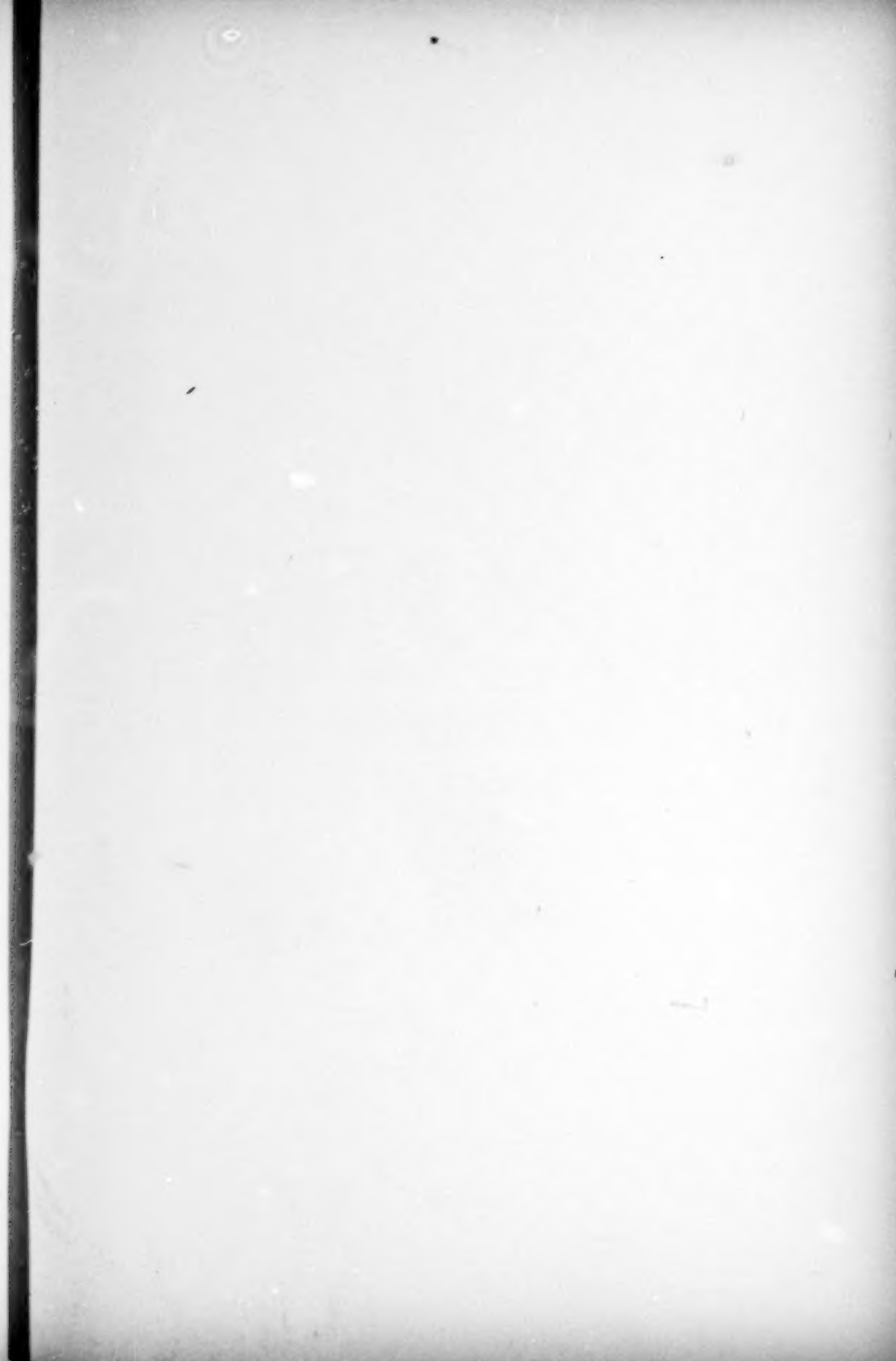
- lh -

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
FILED
August 14, 1960
NOT RECORDED
RALPH ROONEY, JR.
V. JAMES H. HARRIS, JR.
- Appellant -
As the panel considered the petition
for rehearing and is of the opinion that
it should be denied,

IT IS ORDERED that the petition for
rehearing and suggestion for rehearing in
banc are denied.

Entered at the direction of Judge
Wilkinson with the concurrence of Judge
Chapman and Judge Wilkins.

/S/
Clerk



90-879
No. 122

Supreme Court of the United States
FILED

NOV 13 1990

JOSEPH F. SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

RALPH RODNEY FIELDS,

Petitioner,

v.

JOSEPH T. DURHAM, ET AL.,

Respondents.

**SUPPLEMENTAL APPENDIX
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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Fourth Circuit Opinion for which
a Petition is sought
(Estate of V. G. ... 200 F.2d 92
(4th Cir. 1956))

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-1564

RALPH RODNEY FIELDS,

Plaintiff - Appellant,

versus

JOSEPH T. DURHAM, Individually and as
President of Community College of
Baltimore; COMMUNITY COLLEGE OF
BALTIMORE; MAYOR AND CITY COUNCIL OF
BALTIMORE CITY; JAMES S. JEFFERS,
Chairman of the Board of Trustees
Community College of Baltimore; THE BOARD
OF TRUSTEES COMMUNITY COLLEGE OF
BALTIMORE,

Defendants - Appellees.

On Remand from the Supreme Court of the
United States. (No. 88-986).

Submitted: March 7, 1990
Decided: July 19, 1990

Before CHAPMAN, WILKINSON, and WILKINS,
Circuit Judges.

Judgment of the district court affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge Chapman and Judge Wilkins joined.

Barry Lee Steelman, Nicholas D. Cowie, BARRY L. STEELMAN, P.A., Baltimore, Maryland, for Appellant. Neal M. Janey, Burton H. Levin, Baltimore, Maryland, for Appellees.

WILKINSON, Circuit Judge:

This case comes to us on remand from the Supreme Court. It was brought by Ralph Fields, a dismissed community college dean, against several college and local officials whom Fields alleges discharged him without due process. We originally upheld the District court's summary judgment dismissal of the case on the basis of Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984), reasoning that because the officials' alleged failure to follow

state procedures in connection with Fields' termination was "random and unauthorized," due process was satisfied by the meaningful postdeprivation remedies available under state. Fields v. Durham, 856 F.2d 655 (4th Cir. 1988) (Fields I).

On March 5, 1990, the Supreme Court granted certiorari in Fields I, vacated the judgment, and remanded the case for further consideration in light of its decision in Zinermon V. Burch, 110 S. Ct. 975 (1990). After reviewing supplemental briefs submitted by the parties, we conclude that Fields has not alleged a due process violation because he has received sufficient process to satisfy the requirements of the Fourteenth Amendment.

We thus affirm the judgment of the

district court, but for reasons different from those expressed in our earlier decision.

I.

Ralph Fields joined the faculty of the Community College of Baltimore in 1967, where he received faculty tenure three years later. Fields was appointed Dean and Provost of the College in 1978, a position to which he was reappointed in 1984. Under the College's "Conditions of Appointment for Administrators and Non-Instructional Personnel," a document issued pursuant to a 1979 collective bargaining agreement, "[a]n administrative title [could] not be held concurrently with professional rank."

On June 27, 1986, Joseph Durham, President of the Community College, informed Fields that he was being

dismissed as Dean and Provost of the College. Fields' dismissal came after he had been notified of deficiencies in his performance and after he had received an unsatisfactory evaluation. Fields was told of his right to appeal his dismissal to the President's Cabinet, but he did not take that appeal and instead sought direct review of the termination decision by the Board of Trustees. At the hearing before the Board, Fields was represented by counsel, produced witnesses on his behalf, presented numerous exhibits, and had the opportunity to testify and cross-examine Witnesses. After the hearing on August 12, 1986, the Board unanimously affirmed Fields' discharge.

Fields subsequently brought this 42 U.S.C. § 1983 suit against the college, its trustees, President Durham, and the

Mayor and City Council of Baltimore, alleging that his property interest in continuing employment had been denied without due process. He alleged that the process with which he was provided failed to conform with that required by the College's rules and regulations and his employment agreements. He also alleged numerous pendent state law claims sounding in contract and tort. The district court granted defendants' motion for summary judgment on the § 1983 claim and declined jurisdiction over the pendent state law claims. We affirmed the district court's judgment in Fields v. Durham, 856 F.2d 655 (4th Cir. 1988) (Fields I). After deciding that Fields' complaint alleged at most a random and unauthorized failure of college officials to follow state procedures in connection

with his termination, we held, relying on Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984), that due process was satisfied by the meaningful postdeprivation remedies available under Maryland law. The Supreme Court granted certiorari in Fields I, vacated the decision, and remanded for consideration in light of Zinermon v. Burch, 110 S. Ct. 975 (1990).

We now consider how Zinermon affects this case.

II.

Zinermon involved a § 1983 suit brought by Darrell Burch against physicians, administrators, and staff members at Florida State Hospital (FSH), a mental hospital in Chattahoochee, Florida. The state officials admitted Burch into FSH in accordance with

Florida's statutory requirements for voluntary admission to mental health facilities. Burch alleged, however, that he was medicated and disoriented at the time of his admission, and thus was incompetent to give his informed consent. He claimed that the Florida officials "should have afforded him procedures safeguards required by the Constitution before involuntary commitment of a mentally ill person," 110 S. Ct. at 97, and that they deprived him of his liberty without due process by admitting him as a voluntary patient without determining whether he was competent to consent to confinement. The Supreme Court held that these allegations stated a claim under § 1983 because Burch's deprivation (a) was foreseeable due to the nature of mental illness and (b)

could have been guarded against by the state through a predeprivation procedure to determine competence. 110 S. Ct. at 987-90.

Zinermon makes clear that to determine whether a procedural due process violation has occurred, courts must consult the entire panoply of predeprivation and postdeprivation process provided by the state. 110 S. Ct. at 983. The Supreme Court emphasized, however, that the Due Process Clause normally requires a hearing "before the State deprives a person of liberty or property." Id. at 984 (emphasis in original). The general requirement that a state provide predeprivation process reduces the likelihood that erroneous deprivations of constitutionally protected interests will occur. In some

situations, though, the state cannot foresee, and thus cannot avert through implementation of prescriptive procedures, the deprivation in issue. Id. at 984-85. In this narrow class of cases, the Parratt/Hudson rule applies, and "postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the state could be expected to provide." Id. at 985. Under Zinermon, however, the provision of some predeprivation process remains the preferred constitutional course.

Zinermon thus requires that we first ask whether the risk of an erroneous deprivation was foreseeable, and next "whether predeprivation safeguards would have any value in guarding against the kind of deprivation . . . allegedly

suffered." Id. at 988. In the present case, the general risk of deprivation concerned the erroneous deprivation of a public education official's property interest in employment. We believe that this risk was foreseeable, and that Maryland acted to address it by prescribing predeprivation procedures to ensure that its education officials not be erroneously terminated. The termination procedures for administrators and members of the faculty differed in detail (for example, administrative termination required at least thirty days prior notice; dismissals from the faculty required, except for cases of moral turpitude, prior notice of a year). Both classes of personnel, however, were guaranteed prior notice, a statement of the grounds for dismissal, an opportunity

to respond, and the right to appeal the termination decision.

Predeprivation process was not only prescribed here, it was actually provided. On June 27, 1986, Fields received notice from President Durham that his performance as Dean of the Faculty and Provost contained "serious deficiencies," and had been rated "unsatisfactory." After being told of the reasons for his dismissal, Fields was able to appeal the decision both to the President's Cabinet and to the Board of Trustees. Fields did not take his appeal to the President's Cabinet, but instead appealed directly to the Board of Trustees, before whom, as we have noted, he received a hearing, was represented by counsel, produced witnesses on his behalf, presented numerous exhibits, and

had the opportunity to testify and cross-examine witnesses.

In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 535 (1985), the Supreme Court considered "what pretermination process must be accorded a public employee who can be discharged only for cause." Loudermill applied the balancing test of Mathews v. Eldridge, 424 U.S. 319, 335 (1976), which Zinermon reaffirms is the proper standard by which to judge the adequacy of the process afforded. See Zinermon, 110 S. Ct. at 984. The Loudermill Court emphasized that "the pretermination 'hearing,' though necessary, need not be elaborate." 470 U.S. at 545. "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an

opportunity to present his side of the story." Id. at 546. We conclude that the substantial process provided to Fields more than satisfies the requirements of Loudermill.

Fields maintains, however, that the process he received was insufficient. He asserts that in addition to his status as an administrator, he was also a tenured member of the faculty. He argues that he had two distinct property interests warranting two distinct predeprivation procedures: one for his termination as an administrator, and one for his termination as a member of the faculty. He contends that the school only provided him with a pretermination hearing regarding his administrative position, and failed to give him any process at all concerning his termination as a member of

the faculty.

We think this argument is flawed. Whether Fields retained, or under what conditions he might return to, his position as a member of the tenured faculty after assuming his role as an administrator is unclear. The rules of the college, as embodied in the "Conditions of Appointment for Administrative and Non-Instructional Personnel," do not appear to permit an administrator to hold a tenured faculty position.

Drawing the inferences on this point in his favor, however, still will not permit Fields to prevail. His argument implies that within the property interest in employment created by state law exist numerous entitlements within entitlements to perform specific functions. This court

has been reluctant to recognize multiple property interests within the same employment relationship. Although we recognize the significance of an employee's property interest in retaining employment, see Loudermill, 470 U.S. at 543, we have previously held that the constitutionally protected property interest in employment does not extend to the right to possess and retain a particular job or to perform particular services. See Huang v. Board of Governors, ____ F.2d ____, No. 88-1374 (4th Cir. May 4, 1990); Royster v. Board of Trustees, 774 F.2d 618, 621 (4th Cir. 1985). Rather, the property interest is more generally in continued employment, and no deprivation exists so long as the employee receives "payment of the full compensation due under the contract."

Royster, 774 F.2d at 621.

The nature of the property entitlement informs the due process analysis. Loudermill 470 U.S. at 545; Mathews v. Eldridge, 424 U.S. at 333-35. Due process need not require an employer as a matter of federal law to provide succession of different pretermination proceedings commensurate with the various positions an employee might have held over the course of an employer-employee relationship. Under the test for the sufficiency of procedural protection set forth in Mathews v. Eldridge and its progeny, the institution could permissibly focus here on the adequacy of performance and the appropriateness of termination from the job that Fields was performing for it most recently. The locus of dispute between employer and

employee concerned Fields' unsatisfactory performance as Dean of the College. This was the basis of his discharge, and the purpose of the hearing was to ascertain whether this basis was erroneous. It was permissible for the predeprivation process to focus upon it. Thus, as a matter of federal law, Fields received constitutionally adequate predeprivation process with regard to his termination from the job he had been performing for Baltimore Community College since 1978.

Of course, the adequacy of predeprivation process provided by the state is not the end of our inquiry. Both Zinermon and Loudermill stress that courts must also examine the postdeprivation remedies provided by a state to determine whether federal due process is satisfied. Zinermon, 110 S.

Ct. at 983; Loudermill, 470 U.S. at 546-47. This is so because "[t]he [federal procedural due process] violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." Zinermon, 110 S. Ct. at 983. We note in this connection that Fields had available numerous postdeprivation remedies here. In fact, he is now in state court seeking compensatory and punitive damages for numerous contract violations and for deprivation of his property interest under the Maryland Constitution. In addition, as evidenced by the pendent claims raised in his federal complaint, Fields also had available state law claims for civil conspiracy, tortious interference with contractual

relationships, and wrongful discharge. State court is the proper forum to explore the full nature of the employer-employee relationship, including the extent to which the state has failed in any way to adhere to employment contract provisions with respect to Fields' faculty status. Predeprivation procedures are the "initial check against mistaken decisions," but they "need not definitively resolve the propriety of the discharge." Loudermill, 470 U.S. at 545. To shift all the complex congeries of issues implicated by this employer-employee relationship to the predeprivation stage "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Loudermill, 470 U.S. at 546.

In short, Fields has received an abundance of process. The state established specific pretermination procedures, state officials provided Fields with actual process before terminating him from his job, and the state provided numerous postdeprivation tort and contract remedies for illegal official action. Recognizing and respecting the role that procedural due process has played in preventing arbitrary deprivations of individual liberty and property, we hold Fields has failed to state a claim under § 1983. The judgment of the district court is thus

AFFIRMED.

4
No. 90-879

Supreme Court, U.S.
FILED

DEC 19 1990

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1990

RALPH RODNEY FIELDS,

Petitioner,

v.

JOSEPH T. DURHAM, et al.,

Respondents.

Petition For A Writ Of Certiorari To The
Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, on remand from this Court, 110 S.Ct. 1313 (1990), is reported at 909 F.2d 94, and is reprinted in the supplemental appendix to the petition for certiorari.

The memorandum decision of the United States District Court for the District of Maryland (Motz, J.) has not been reported. It is reprinted in the appendix to the petition for certiorari.

STATEMENT OF THE CASE

Respondents, Joseph T. Durham, James S. Jeffers, and the Community College of Baltimore, submit this statement of the case to correct the inaccuracies and omissions in Petitioner's statement.

1. This case was commenced in the United States District Court by Petitioner, a dismissed Community College Dean, against several college and local officials whom Petitioner alleges discharged him without due process. The Court of Appeals originally upheld the District Court's summary judgment dismissal of the case on the basis of *Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984), reasoning that because the officials' alleged failure to follow state procedures in connection with Petitioner's termination was "random and unauthorized," due process was satisfied by the meaningful postdeprivation remedies available to Petitioner under state law. *Fields v. Durham*, 856 F.2d 655 (4th Cir. 1988) (Fields I).

On March 5, 1990, this Court granted certiorari in *Fields I*, vacated the judgment, and remanded the case for further consideration in light of its decision in *Zinerman v. Burch*, 110 S.Ct. 975 (1990).

On remand the Court of Appeals determined that supplemental briefing in light of *Zinerman* was appropriate, and directed the parties as follows, "In particular, the Court requests that the parties indicate the extent of predeprivation process provided in this case and whether it comported with the requirements of *Mathews v. Eldridge*, 424 U.S. 319 (1976), and other relevant Supreme Court cases." Order of the Court of Appeals, dated March 26, 1990. After reviewing supplemental briefs and appendixes filed by the parties, the Court of Appeals again affirmed the judgment of the District Court, *Fields v. Durham*, 909 F.2d 94 (4th Cir. 1990) (*Fields II*), concluding as a matter of law that Petitioner received sufficient process to satisfy the requirements of the Fourteenth Amendment. Petitioner's petition for rehearing and suggestion for rehearing in banc was denied by the Court of Appeals, and Petitioner now seeks review of *Fields II* by way of certiorari in this Court.

2. The facts underlying this litigation are as stated by the Court of Appeals. Supp. App. to Petition for Certiorari, 4, 5. Petitioner joined the faculty of the Community College of Baltimore in 1967, where he received faculty tenure three years later. Petitioner was appointed Dean and Provost of the College in 1978, a position to which he was reappointed in 1984.

On June 27, 1986, Respondent Joseph T. Durham, President of the Community College of Baltimore,

informed Petitioner that he was being dismissed as Dean and Provost of the College. Petitioner's dismissal came after he had been notified of deficiencies in his performance and after he had received an unsatisfactory evaluation. Petitioner was told of his right to appeal his dismissal to the President's Cabinet, but he did not take that appeal and instead sought direct review of the termination decision by the Board of Trustees. At the hearing before the Board, Petitioner was represented by counsel, produced witnesses on his behalf, presented numerous exhibits, and had the opportunity to testify and cross examine witnesses. After the hearing on August 12, 1986, the Board unanimously affirmed Petitioner's discharge.

3. Petitioner subsequently brought this 42 U.S.C. § 1983 suit against the College, its Trustees, President Durham, and the Mayor and City Council of Baltimore, alleging that his property interest in continuing employment had been denied without due process. He alleged that the process which he was provided failed to conform with that required by the College's rules and regulations and his employment agreements. He also alleged numerous pendent state law claims sounding in contract and tort. The District Court granted Respondents' motion for summary judgment on the § 1983 claim and declined jurisdiction over the pendent state law claims.

The Court of Appeals affirmed the District Court's judgment in *Fields v. Durham*, 856 F.2d 655 (4th Cir. 1988) (*Fields I*). After deciding that Petitioner's complaint alleged at most a random and unauthorized failure of college officials to follow state procedures in connection with his termination, the Court of Appeals held, relying on *Parratt v. Taylor* and *Hudson v. Palmer*, that due process

was satisfied by the meaningful postdeprivation remedies available under Maryland law. This Court granted certiorari in *Fields I*, vacated the decision, and remanded for consideration in light of *Zinerman v. Burch*.

In considering the case on remand, the Court of Appeals noted that *Zinerman* requires courts to consult the entire panoply of predeprivation and postdeprivation process provided by the state to determine whether a procedural due process violation has occurred. After recognizing that due process normally requires a hearing before the state deprives a person of liberty or property, the Court of Appeals considered the extent of predeprivation process provided to Petitioner, and held that it more than satisfied due process. The Court of Appeals also noted that Petitioner has available to him numerous post-deprivation remedies under state law to explore the full nature of his employment rights, including whether Respondents failed in any way to adhere to Petitioner's contract of employment. The Court of Appeals summarized its holding as follows, "In short, [petitioner] has received an abundance of process. The state established specific pretermination procedures, state officials provided [petitioner] with actual process before terminating him from his job, and the state provided numerous post-deprivation tort and contract remedies for illegal official action." Supp. App. to Petition for Certiorari, 21.

REASONS FOR DENYING THE PETITION

PETITIONER HAS FAILED TO DEMONSTRATE ANY SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO GRANT DISCRETIONARY REVIEW

Petitioner presents three questions for review. None of the questions involve special or important issues which would justify issuance of a writ of certiorari. The decision of the Court of Appeals implicates none of the traditional grounds for certiorari jurisdiction: it does not conflict with decisions of other Courts of Appeals on the same subject; and it does not involve an important question of federal law which has not been, but should be, decided by the Supreme Court. Petitioner does not even assert that review by this Court would produce an opinion that will give guidance to the lower courts, or that there would be any national impact in letting the lower court decision stand. The petition for certiorari is nothing more than an unsuccessful attempt to show that the decision below was erroneous.

QUESTION A

The first question presented, as framed by Petitioner, is "Whether the Court of Appeals erred when it violated 28 U.S.C. § 1738 by failing to give preclusive effect to a prior state court judgment." As Petitioner's argument discloses, this question involves a mere assertion of error which turns on the peculiar facts of this case; and not even Petitioner pretends that a decision by this Court will effect anyone other than the parties to this case.

But Petitioner's assertion that the lower court violated 28 U.S.C. § 1738 by failing to give preclusive effect

to a state court judgment is disingenuous and misleading. At no time in this litigation prior to filing the petition for certiorari did Petitioner invoke 28 U.S.C. § 1738 or assert that a state court judgment between the parties had preclusive effect. This Court should deny review as to Question A since ordinarily it does not decide questions not raised or involved in the lower court. *Youakim v. Miller*, 425 U.S. 231 (1976); *United States v. Mendenhall*, 446 U.S. 544 (1980).

That Petitioner never raised below the issue presented in Question A is easily confirmed by reference to the decision of the Court of Appeals, which never once mentions the issue. The Court of Appeals hardly "overlooked the state court judgment," as asserted on page 11 of the petition for certiorari. This is further confirmed with reference to page i of Petitioner's brief in the Court of Appeals, App. 1, *infra*, wherein the sole argument presented was: "The pre-deprivation process provided to Fields in the taking of his constitutionally protected property interests as an administrator and tenured faculty member, was not constitutionally sufficient."

Furthermore, the record in this case does not contain pleadings and other materials from the state court litigation sufficient for this Court to answer Question A even if the Court was so inclined. Petitioner's bald assertion that a state court judgment between the parties must be given preclusive effect in the instant federal litigation cannot be reviewed because all that appears of record concerning the state court litigation is four pages of transcript of a hearing on a motion for summary judgment; a one page order granting summary judgment; and a two page order

denying a motion for judgment n.o.v./new trial. These state court materials, which are appended to the petition for certiorari, are clearly insufficient for this Court to decide whether the state court judgment has any preclusive effect.

Additionally, it is far from clear whether the state court judgment upon which Petitioner relies is a "final judgment" entitled to preclusive effect. The state court judgment is that of the Circuit Court for Baltimore City, a *nisi prius* court, and is currently pending on direct appeal before the Maryland Court of Special Appeals (the intermediate appellate court which decides appeals as of right from the circuit court). As a matter of Maryland law, the issue of the preclusive effect of a judgment of the circuit court on appeal is an open question. See, *Davis v. Frederick County*, 25 Md. App. 68, 73 n.4 (1975) ("While it is well settled that the rules of *res judicata* do not apply unless there is a final judgment on the merits, the effect of the pendency of an appeal on the applicability of that doctrine has never been decided in Maryland."). Thus, before this Court could decide Question A in Petitioner's favor, it would have to resolve an open question of Maryland law.

QUESTION B

The second question presented in the petition is whether the Court of Appeals erred in failing to stay its determination of this case in light of a state court action between the parties. Like the first question, the second question invokes none of the traditional grounds for certiorari jurisdiction in the Supreme Court. Petitioner's argument amplifying the reasons relied upon for

allowance of the writ as to Question B constitutes a mere assertion that the lower court "abused its discretion when it failed to grant [Petitioner's] motion to stay," (Petition for Certiorari, 42) without any assertion that resolution of the question would be of importance to anyone other than the parties to this case.

For the reasons set forth in the Memorandum of Law in Opposition to Motion to Stay which Respondents filed in the Court of Appeals, a copy of which is appended hereto (App. 2-7, *infra*), the lower court did not abuse its discretion in denying Petitioner's motion to stay. Respondents incorporate by reference but will not repeat those reasons here, except to point out that the motion to stay, like the petition for certiorari itself, was filed by Petitioner in an attempt to forestall reversal of the state court judgment which was erroneously entered in his favor, and which is now pending for review before the Maryland Court of Special Appeals.

Petitioner cited no legal authority in support of the motion to stay which he filed in the Court of Appeals, and, contrary to the assertion on page 10 of the petition, he did not renew the motion when he filed his brief in the Court of Appeals.¹ The Court of Appeals did not discuss

¹ Petitioner's assertion that "in the supplemental brief [Petitioner] incorporated the motion to stay and argued that the 'operant facts' relevant to the federal appeal had already been determined in the state court," (Petition for Certiorari, 10) is untrue. The only reference to the motion to stay which is contained in Petitioner's brief in the Court of Appeals states as follows: "Appellant has set forth in his motion to stay appeal during pendency of state court appeal, the facts concerning his

(Continued on following page)

the issue in its opinion. Therefore, the second question presented was not preserved for appellate review. *Youakim v. Miller*, 425 U.S. 231 (1976); *United States v. Mendenhall*, 446 U.S. 544 (1980).

QUESTION C

Like the first two questions presented by Petitioner, the third question involves merely an assertion of error, the resolution of which would impact upon only the parties to this case. Petitioner has lost sight of the fact that the Supreme Court does not sit merely to correct errors by lower courts, and that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion . . . granted only when there are special and important reasons therefor." Rules of the Supreme Court, Rule 10.

Petitioner's Question C invites this Court to determine whether the Court of Appeals applied the proper standard in reviewing the District Court's grant of summary judgment in Respondents' favor. There is no contention in the petition that this case involves an examination of the contours or limits of *Zinerman v. Burch*, or that the Court of Appeals misapplied *Zinerman*.

(Continued from previous page)

filing suit in the state court. Appellant adopts all *facts* set forth in said motion to stay as though each were fully set forth in this supplemental brief." Petitioner's Brief in the Court of Appeals, 2, n. 1, App. 8, *infra*. In his brief to the Court of Appeals Petitioner thus incorporated the "facts" set forth in the motion to stay, but neither renewed the motion itself nor incorporated the grounds upon which the motion had been based.

Furthermore, Petitioner's assertion that the Court of Appeals erred is without merit. The facts, even viewed in the light most favorable to Petitioner, established that he was not denied due process. As noted by the Court of Appeals, Petitioner received an abundance of predeprivation process. On June 27, 1986, Petitioner received notice from the President of the College that his performance as Dean of Faculty and Provost contained "serious deficiencies," and had been rated "unsatisfactory." After being told of the reasons for his dismissal, Petitioner was able to appeal the decision both to the President's Cabinet and to the Board of Trustees. Petitioner did not take his appeal to the President's Cabinet, but instead appealed directly to the Board of Trustees, before whom, as noted previously, he received a hearing, was represented by counsel, produced witnesses on his behalf, presented numerous exhibits, and had the opportunity to testify and cross-examine witnesses. Additionally, the state provided Petitioner numerous postdeprivation remedies to explore whether the college officials failed to adhere to his employment agreement. Such abundant process clearly satisfies the Fourteenth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

NEAL M. JANEY
City Solicitor

BURTON H. LEVIN
Assistant Solicitor

December, 1990

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App. 1

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[Respondents' Memorandum of Law in Opposition to
Motion to Stay, filed in the Court of Appeals]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 88-1564

RALPH RODNEY FIELDS,
Plaintiff-Appellant

v.

JOSEPH T. DURHAM, Individually and as
President of Community College of
Baltimore; COMMUNITY COLLEGE OF
BALTIMORE; MAYOR AND CITY COUNCIL OF
BALTIMORE CITY; JAMES S. JEFFERS,
Chairman of the Board of Trustees
Community College of Baltimore;
THE BOARD OF TRUSTEES COMMUNITY
COLLEGE OF BALTIMORE,

Defendants-Appellees

MEMORANDUM OF LAW IN OPPOSITION
TO MOTION TO STAY

Appellees, by their attorney, Burton H. Levin, Assistant Solicitor, file this Memorandum of Law in Opposition to the Motion to Stay filed by Appellant (hereinafter "Fields"), and state as follows.

Fields' Motion to Stay is filed to gain a tactical advantage in the state court proceeding to which he makes cryptic reference, and should be denied. Fields cites no legal authority in support of his motion, and research by Appellees' counsel disclosed no precedent for the relief requested. This court should exercise its jurisdiction to resolve the substantial federal issues involved in this case. Absent significant countervailing reasons, the

federal courts are obliged to exercise their jurisdiction. *Colorado River Waste Conservation District v. United States*, 424 U.S. 800 (1976). Fields has not shown any significant interest in support of his motion. Even the passing reference which Fields makes to the state court action discloses that there are no federal claims involved therein. Fields is asking this court to stay its judgment on important issues of federal law between the parties while he litigates separate state law issues in state court. There is simply no authority or basis for such a request. Furthermore, Appellees assert that they never deprived Fields of his constitutional right to procedural due process, and that such will be the decision of this court after considering the briefs and arguments of the parties. Appellees desire to have their day in court, and to have the constitutionality of their conduct vindicated.

As a basis for his motion to stay Fields merely recites that "he will not seek a new trial on the merits in the federal court if his state court verdicts are upheld at the conclusion of the state appeal process." (Motion to Stay Federal Appeal Process During the Pendency of State Court Appeal, paragraph 6). Such recitation provides no basis for this court to grant the requested stay. First, the state court appeal process may result in a remand for a new trial [sic]. If that occurs, it could take years before the state appeal process is concluded, and, pursuant to Fields' request, years before this court decides this case. Second, Fields offers no assurance how he will proceed if some but not all of the state court verdicts are upheld on appeal.

Because Fields has gone outside of the record on appeal, and made passing reference to the state court

action between the parties, Appellees believe it their obligation to provide the court with essential information concerning the state court action. On September 13, 1988 this court decided that Fields' constitutional rights were not deprived by Appellees' alleged unconstitutional actions since he had adequate postdeprivation remedies under state law. *Fields v. Durham*, 856 F.2d 655 (4th Cir. 1988). Specifically, this court stated what state court remedies Fields could pursue (those being the pendent state claims he asserted in his federal complaint): breach of contract, wrongful discharge, civil conspiracy and tortious interference with contract. 856 F.2d at 659.

On December 12, 1988 Fields filed a petition for writ of certiorari in the United States Supreme Court. That petition was still pending when, on January 13, 1989, Fields filed suit against the appellees in state court. The factual allegations in the state court complaint are identical to those in the instant federal action. Instead of confining himself to tort and contract claims in the state court action however, as both Judge Motz and this court assumed he would, Fields joined a count alleging that his rights to procedural due process, *as guaranteed by the Maryland Constitution*, were violated. The procedural due process violation count in the state court action is identical to that in the instant case, except in the former the state constitution is relied on while in the latter the federal constitution is.

Despite Appellees' opposition, which among other arguments was based on the res judicata effect of this court's decision, the state court judge presiding granted summary judgment in *Fields'* favor, finding that his termination from employment at the Community College of

Baltimore violated his state constitutional right to procedural due process, and breached his contract.¹ An inquisition on damages resulted in a verdict in Fields's favor of \$100,000.00 compensatory damages for breach of contract, \$400,000.00 compensatory damages for violation of his state due process rights, and \$1,250,000.00 in punitive damages for violation of his state due process rights.²

Appellees have appealed the state court judgment in Fields' favor to the Maryland Court of Special Appeals. The record has not yet been transferred from the clerk of the Circuit Court for Baltimore City to the clerk of the Court of Special Appeals, and therefore no briefing schedule has been established in that court. In the Court of Special Appeals Appellees will continue to maintain, *inter alia*, that *res judicata* barred the due process count of the state court action inasmuch as Appellees obtained a federal judgment in their favor on the same cause of

¹ Initially Fields' motion for summary judgment was denied. However, on a motion for reconsideration heard days before the trial was to start, another circuit court judge departed from the earlier ruling and granted summary judgment. Appellees are confident that the Maryland Court of Special Appeals will reverse, since the basis for summary judgment was the trial judge's erroneous belief that a violation of the College's by-laws in and of itself established a violation of Fields' right to procedural due process. See, *Kilcoyne v. Morgan*, 664 F.2d 940 (4th Cir. 1981).

² The relevant history of the state court action is recited in the memorandum of law in support of motion for judgment n.o.v. or, in the alternative, for a new trial, which Appellees filed in the state court action, a copy of which is attached hereto for the court's reference.

action Fields subsequently brought in state court. See, *MPC, Inc. v. Kenney*, 279 Md. 29, 33 (1977) (The standard for determining whether two causes of action are the same for purposes of invoking res judicata is whether the same evidentiary facts would sustain both actions). See also *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493 (D.C. Cir. 1983) (Under well established law, the pendency of an appeal does not diminish the res judicata effect of a judgment rendered by a federal court).

It is clear that Fields is wary of a decision of this court in favor of Appellees, because of the consequences it will have when the Maryland Court of Special Appeals considers the case before it. It is also clear that the instant motion to stay is an attempt by Fields to forestall a ruling by this court which is adverse to him.

On March 5, 1990, the Supreme Court granted Fields' petition for certiorari and summarily vacated this court's judgment, and this court has ordered rebriefing. In particular, this court has directed the parties to brief the issue of the extent of predeprivation process received by Fields, and whether it satisfied due process. As argued in their brief, appellees provided Fields all the process he was due before his termination. If that determination is made by this court, and the judgment of the district court is again affirmed, it will be clear to the Maryland Court of Special Appeals that appellees violated no constitutional right of Fields. See *Bureau of Mines v. Georgia's Creek Coal and Land Company*, 272 Md. 143 (1974) (The due process provisions of the United States and Maryland Constitutions protect the same interests); *McIver v. Russell*, 264 F.Supp. 22 (D. Md. 1967) (accord).

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With that background concerning the state court action, it is obvious that Fields' motion to stay is not based on his desire to "benefit the court's docket," but to avoid the consequences of a decision against him by this court. Appellees respectfully request that Fields' Motion to Stay be denied.

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[Page 2 of Petitioner's Supplemental Brief in
the Court of Appeals]

* * *

Should this Court decide to treat this appeal as a review of a Motion for Summary Judgment, beyond the scope of the initial review of Judge Motz, then the most relevant and pertinent evidence that this Court could review would be the testimony of witnesses and evidence before the State Court action which proceeded to trial in January of 1990.¹ . . .

¹ Appellant has set forth in his Motion to Stay Appeal During Pendency of State Court Appeal, the facts concerning his filing suit in the State Court. Appellant adopts all facts set forth in said Motion to Stay as though each were fully set forth in this Supplemental Brief.

